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IN THE

SUPREME COURT

OF

WASHINGTON

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ERRATA

ERRORS NOTED IN PREVIOUS VOLUMES

Vol. 90 Wash.

Page 416, 2d syllabus, and page 421, line 11 from bottom, for Const., art. 2, § 19, read Const., art. 1, § 12

CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 13404. Department One. December 26, 1916.]

D. E. GILMAN, *Appellant*, v. W. B. BRUNTON *et al.*, *Respondents*.[1]

SPECIFIC PERFORMANCE—CONTRACTS—DESCRIPTION—CERTAINTY. An agreement for the exchange of properties, describing a tract as "48 acres more or less bounded upon the north by Cedar creek, situated about one mile east of Etna, Wash.," is too indefinite for specific performance, notwithstanding the further mention that it was the "same property conveyed to the party of the first part by W. Tate and wife in 1912," where the Tate deed was not delivered with the contract; since parol evidence would be necessary to assist in identifying the land.

SAME—DEFENSES—TENDER AND ABILITY TO PERFORM—EVIDENCE—SUFFICIENCY. Specific performance of a contract for an exchange of properties is properly denied, where plaintiff's tender of his deed was insufficient as being outside the chain of title, and he failed to furnish an abstract within the time agreed upon, although demanded, and an abstract furnished at the trial showed transactions that were hardly in good faith, and that plaintiff had not been ready, able and willing to perform on his part.

SAME—DEFENSES — EQUITABLE DEFENSES — UNCONSCIONABLE CONTRACT. Specific performance will not be decreed against parties who were induced by fraud to give property of the value of $11,100 for property not worth more than $7,700, although they made their own examination; since a court of equity will not lend its aid to enforce an unfair contract, leaving the party to his remedy in an action at law for damages.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered July 27, 1915, dismissing an

[1]Reported in 161 Pac. 835.

action for specific performance, after a trial on the merits before the court. Affirmed.

Walter G. Hayes and *Miller & Wilkinson*, for appellant.

McMaster, Hall & Drowley, for respondents.

PER CURIAM.—On November 1, 1913, the plaintiff and defendants entered into the following agreement:

"This agreement, made and entered into this 1st day of November, 1913, by and between W. B. Brunton and Opal M. Brunton, husband and wife, hereinafter known as the party of the first part, and W. L. Twitchell, hereinafter known as the party of the second part, witnesseth:

"Whereas, W. B. Brunton and Opal M. Brunton, parties of the first part, are the owners in fee simple of the following bounded and described property, situated in the county of Clarke, state of Washington, 48 acres, more or less, bounded on the north by Cedar creek and situated about one mile east of Etna, Wash., said property being the same property conveyed to the party of the first part by W. Tate and wife in 1912.

"Whereas, W. L. Twitchell, party of the second part, is the owner in fee simple of the following described real and personal property, situated in the county of Morrow, state of Oregon: 360 acres of land in section 3, township 3 south of range 26 east of the W. M. Also the following personal property: 4 horses, 2 sets of harness; 1 grain drill, 1 four section harrow, one 2 bottom plow, 1 walking plow, 1 header, 2 wagons, fanning mill;

"Whereas, the parties of the first part are anxious to, and have this day offered to exchange their land herein described, for the land and personal property of the party of the second part herein described, said property of the parties of the first part to be subject to a mortgage of $800 with interest paid up to date. Said property of the party of the second part herein described to be subject to an incumbrance of $8,100 which the parties of the first part agree to assume; said incumbrance to be in the form of a contract note; said note to be paid as follows: One half of all the grain raised to be delivered to the Heppner Warehouse & Milling Co.'s warehouse, at Heppner, Ore., free and clear from all expense, and

to be sold and the proceeds to apply on said note. First: the interest to be paid, and the balance applied on the principal. Said note to draw interest at the rate of 8% per annum on the sum of $3,000 which is now a *lean* on said property, and at the rate of 6% per annum on the balance of $5,100.

"Whereas, the party of the second part is anxious to accept the terms of and exchange properties as offered by the parties of the first part, to make such trade.

"In consideration of the premises and the agreements of the parties herein contained, and of ten ($10) dollars, paid by each of them to the other this day to bind the bargain, the receipt of which sum is hereby acknowledged, we do hereby undertake, promise and agree to exchange our respective properties as described herein, one for the other and the parties of the first part agree to furnish an abstract of title of their lands within 10 days from the date hereof, showing a fee simple title, subject to the incumbrance herein mentioned, and they further agree to give a warranty deed to the party of the second part for said land, subject to said incumbrance to be assumed by the party of the second part. The party of the second part agrees to execute and deliver to the party of the first part a warranty deed for said above described property conveying the same in fee simple, subject to the above mentioned incumbrance to be assumed by the party of the first part. The party of the second part also agrees to furnish an abstract of title of his lands within 10 days from the date hereof, showing a fee simple title, subject to the incumbrance herein mentioned.

"It is further understood and agreed by and between the parties hereto, that said deeds of the parties herein shall be executed and tendered to the other party within 30 days from the delivery of the abstracts, and each of the parties hereto undertake, promise and agree to fully consummate said exchange of properties within 30 days from the date of receiving said abstract, and neither party hereto shall have the right or authority to withdraw from, or refuse to complete said exchange of properties for any cause whatever, except where the title to some of the property to be exchanged shall be objected to as unmerchantable, and such objections, if any, shall be reduced to writing and personally served upon the other party, his agent or attorney, and if any objections are found to the title, the owner of the land is hereby given

30 days, in which to clear such objections, and if cleared the exchange of properties shall be consummated within 10 days thereafter, and this contract shall be fully consummated.

"The time in which each of the parties are to perform the acts and things herein agreed upon is hereby declared to be of the essence of this agreement.

"In witness whereof the parties have hereunto set their hands and seals in duplicate the day and year first above written.

	W. B. Brunton,	(Seal)
"Witness.	Opal M. Brunton,	(Seal)
"P. E. Alvord.	D. E. Gilman,	(Seal)"

The parties did not exchange deeds nor do anything else in furtherance of the contract, except that, about November 15, 1913, defendants entered into possession of the Morrow county land and undertook its cultivation. Coming to a realization that they had not received what they bargained for, the defendants, about September 1, 1914, abandoned the Oregon property, moved back to their Clarke county farm, and refused to carry out the contract of exchange. The plaintiff at once brought an action for specific performance. From a decree dismissing the action, plaintiff appeals.

The contract was so indefinite and uncertain in some of its terms that appellant found himself under the necessity of including an action for its reformation as a preliminary to its specific performance. The agreement recites that one W. L. Twitchell, as the owner of the fee simple title to the Oregon land, is one of the contracting parties, while the agreement with the Bruntons is executed by D. E. Gilman instead of by Twitchell. The Oregon land is also described as 360 acres in "Section 3, Twp. 3 South of Range 26, East of W. M.," while in fact but 120 acres of the land involved lie in section 3, and the balance of 240 acres lies in section 4 of the same township and range. It may be conceded that the appellant was entitled to a reformation in these particulars, since the evidence showed that respondents were put in possession of the right lands and that they were informed that appellant was the real owner, although the record title was

at the time in the name of Twitchell. But, conceding the foregoing defects to have been duly corrected so as to warrant specific performance, the agreement is still defective in that the Brunton land is not sufficiently described to admit of its identification without resort to parol testimony. The description is as follows:

"The following described property situated in Clarke county, state of Washington, 48 acres more or less bounded upon north by Cedar creek and situated about one mile east of Etna, Wash., said property being the same property conveyed to the party of the first part by W. Tate and wife in 1912."

While it is the law that a reference in a contract or deed to another instrument which contains a description of the property justifies the examination of the two instruments together for the purpose of identifying the particular property referred to, the description herein does not come within the rule. The reference is not to an instrument containing a sufficient description, but merely declares the property is "the same property conveyed to the party of the first part [Bruntons] by W. Tate and wife in 1912." Parol evidence would be necessary to assist in determining what description was to be incorporated in the decree for specific performance. In *Thompson v. English*, 76 Wash. 23, 135 Pac. 664, in a case involving a somewhat similar description, this court said:

"The description of the property as contained in the contract was, 'Seventy-nine acres in section 30, township 2 N., Range 3, E. W. M., Clarke Co., Wash. Owner, A. E. English.' It will be observed that this description does not specify which 79 acres in section 30 was intended. To ascertain this fact, resort must be had to oral testimony. The description given cannot be applied to any definite property."

The fact that appellant was in possession of the deed from the Tates to the Bruntons in which the Brunton property was correctly described would be immaterial, in view of Brunton's testimony that he did not deliver the deed with the contract, and Gilman's testimony that he did not know how or when

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action for specific performance, after a trial on the merits before the court. Affirmed.

Walter G. Hayes and *Miller & Wilkinson*, for appellant.

McMaster, Hall & Drowley, for respondents.

PER CURIAM.—On November 1, 1913, the plaintiff and defendants entered into the following agreement:

"This agreement, made and entered into this 1st day of November, 1913, by and between W. B. Brunton and Opal M. Brunton, husband and wife, hereinafter known as the party of the first part, and W. L. Twitchell, hereinafter known as the party of the second part, witnesseth:

"Whereas, W. B. Brunton and Opal M. Brunton, parties of the first part, are the owners in fee simple of the following bounded and described property, situated in the county of Clarke, state of Washington, 48 acres, more or less, bounded on the north by Cedar creek and situated about one mile east of Etna, Wash., said property being the same property conveyed to the party of the first part by W. Tate and wife in 1912.

"Whereas, W. L. Twitchell, party of the second part, is the owner in fee simple of the following described real and personal property, situated in the county of Morrow, state of Oregon: 360 acres of land in section 3, township 3 south of range 26 east of the W. M. Also the following personal property: 4 horses, 2 sets of harness; 1 grain drill, 1 four section harrow, one 2 bottom plow, 1 walking plow, 1 header, 2 wagons, fanning mill;

"Whereas, the parties of the first part are anxious to, and have this day offered to exchange their land herein described, for the land and personal property of the party of the second part herein described, said property of the parties of the first part to be subject to a mortgage of $800 with interest paid up to date. Said property of the party of the second part herein described to be subject to an incumbrance of $8,100 which the parties of the first part agree to assume; said incumbrance to be in the form of a contract note; said note to be paid as follows: One half of all the grain raised to be delivered to the Heppner Warehouse & Milling Co.'s warehouse, at Heppner, Ore., free and clear from all expense, and

to be sold and the proceeds to apply on said note. First: the interest to be paid, and the balance applied on the principal. Said note to draw interest at the rate of 8% per annum on the sum of $3,000 which is now a *lean* on said property, and at the rate of 6% per annum on the balance of $5,100.

"Whereas, the party of the second part is anxious to accept the terms of and exchange properties as offered by the parties of the first part, to make such trade.

"In consideration of the premises and the agreements of the parties herein contained, and of ten ($10) dollars, paid by each of them to the other this day to bind the bargain, the receipt of which sum is hereby acknowledged, we do hereby undertake, promise and agree to exchange our respective properties as described herein, one for the other and the parties of the first part agree to furnish an abstract of title of their lands within 10 days from the date hereof, showing a fee simple title, subject to the incumbrance herein mentioned, and they further agree to give a warranty deed to the party of the second part for said land, subject to said incumbrance to be assumed by the party of the second part. The party of the second part agrees to execute and deliver to the party of the first part a warranty deed for said above described property conveying the same in fee simple, subject to the above mentioned incumbrance to be assumed by the party of the first part. The party of the second part also agrees to furnish an abstract of title of his lands within 10 days from the date hereof, showing a fee simple title, subject to the incumbrance herein mentioned.

"It is further understood and agreed by and between the parties hereto, that said deeds of the parties herein shall be executed and tendered to the other party within 30 days from the delivery of the abstracts, and each of the parties hereto undertake, promise and agree to fully consummate said exchange of properties within 30 days from the date of receiving said abstract, and neither party hereto shall have the right or authority to withdraw from, or refuse to complete said exchange of properties for any cause whatever, except where the title to some of the property to be exchanged shall be objected to as unmerchantable, and such objections, if any, shall be reduced to writing and personally served upon the other party, his agent or attorney, and if any objections are found to the title, the owner of the land is hereby given

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Page 416, 2d syllabus, and page 421, line 11 from bottom, for Const., art. 2, § 19, read Const., art. 1, § 12

CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 13404. Department One. December 26, 1916.]

D. E. GILMAN, *Appellant*, v. W. B. BRUNTON *et al.*, *Respondents*.[1]

SPECIFIC PERFORMANCE—CONTRACTS—DESCRIPTION—CERTAINTY. An agreement for the exchange of properties, describing a tract as "48 acres more or less bounded upon the north by Cedar creek, situated about one mile east of Etna, Wash.," is too indefinite for specific performance, notwithstanding the further mention that it was the "same property conveyed to the party of the first part by W. Tate and wife in 1912," where the Tate deed was not delivered with the contract; since parol evidence would be necessary to assist in identifying the land.

SAME—DEFENSES—TENDER AND ABILITY TO PERFORM—EVIDENCE—SUFFICIENCY. Specific performance of a contract for an exchange of properties is properly denied, where plaintiff's tender of his deed was insufficient as being outside the chain of title, and he failed to furnish an abstract within the time agreed upon, although demanded, and an abstract furnished at the trial showed transactions that were hardly in good faith, and that plaintiff had not been ready, able and willing to perform on his part.

SAME—DEFENSES — EQUITABLE DEFENSES — UNCONSCIONABLE CONTRACT. Specific performance will not be decreed against parties who were induced by fraud to give property of the value of $11,100 for property not worth more than $7,700, although they made their own examination; since a court of equity will not lend its aid to enforce an unfair contract, leaving the party to his remedy in an action at law for damages.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered July 27, 1915, dismissing an

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action for specific performance, after a trial on the merits before the court. Affirmed.

Walter G. Hayes and *Miller & Wilkinson*, for appellant.

McMaster, Hall & Drowley, for respondents.

PER CURIAM.—On November 1, 1913, the plaintiff and defendants entered into the following agreement:

"This agreement, made and entered into this 1st day of November, 1913, by and between W. B. Brunton and Opal M. Brunton, husband and wife, hereinafter known as the party of the first part, and W. L. Twitchell, hereinafter known as the party of the second part, witnesseth:

"Whereas, W. B. Brunton and Opal M. Brunton, parties of the first part, are the owners in fee simple of the following bounded and described property, situated in the county of Clarke, state of Washington, 48 acres, more or less, bounded on the north by Cedar creek and situated about one mile east of Etna, Wash., said property being the same property conveyed to the party of the first part by W. Tate and wife in 1912.

"Whereas, W. L. Twitchell, party of the second part, is the owner in fee simple of the following described real and personal property, situated in the county of Morrow, state of Oregon: 360 acres of land in section 3, township 3 south of range 26 east of the W. M. Also the following personal property: 4 horses, 2 sets of harness; 1 grain drill, 1 four section harrow, one 2 bottom plow, 1 walking plow, 1 header, 2 wagons, fanning mill;

"Whereas, the parties of the first part are anxious to, and have this day offered to exchange their land herein described, for the land and personal property of the party of the second part herein described, said property of the parties of the first part to be subject to a mortgage of $800 with interest paid up to date. Said property of the party of the second part herein described to be subject to an incumbrance of $8,100 which the parties of the first part agree to assume; said incumbrance to be in the form of a contract note; said note to be paid as follows: One half of all the grain raised to be delivered to the Heppner Warehouse & Milling Co.'s warehouse, at Heppner, Ore., free and clear from all expense, and

to be sold and the proceeds to apply on said note. First: the interest to be paid, and the balance applied on the principal. Said note to draw interest at the rate of 8% per annum on the sum of $3,000 which is now a *lean* on said property, and at the rate of 6% per annum on the balance of $5,100.

"Whereas, the party of the second part is anxious to accept the terms of and exchange properties as offered by the parties of the first part, to make such trade.

"In consideration of the premises and the agreements of the parties herein contained, and of ten ($10) dollars, paid by each of them to the other this day to bind the bargain, the receipt of which sum is hereby acknowledged, we do hereby undertake, promise and agree to exchange our respective properties as described herein, one for the other and the parties of the first part agree to furnish an abstract of title of their lands within 10 days from the date hereof, showing a fee simple title, subject to the incumbrance herein mentioned, and they further agree to give a warranty deed to the party of the second part for said land, subject to said incumbrance to be assumed by the party of the second part. The party of the second part agrees to execute and deliver to the party of the first part a warranty deed for said above described property conveying the same in fee simple, subject to the above mentioned incumbrance to be assumed by the party of the first part. The party of the second part also agrees to furnish an abstract of title of his lands within 10 days from the date hereof, showing a fee simple title, subject to the incumbrance herein mentioned.

"It is further understood and agreed by and between the parties hereto, that said deeds of the parties herein shall be executed and tendered to the other party within 30 days from the delivery of the abstracts, and each of the parties hereto undertake, promise and agree to fully consummate said exchange of properties within 30 days from the date of receiving said abstract, and neither party hereto shall have the right or authority to withdraw from, or refuse to complete said exchange of properties for any cause whatever, except where the title to some of the property to be exchanged shall be objected to as unmerchantable, and such objections, if any, shall be reduced to writing and personally served upon the other party, his agent or attorney, and if any objections are found to the title, the owner of the land is hereby given

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"Whereas, the party of the second part is anxious to accept the terms of and exchange properties as offered by the parties of the first part, to make such trade.

"In consideration of the premises and the agreements of the parties herein contained, and of ten ($10) dollars, paid by each of them to the other this day to bind the bargain, the receipt of which sum is hereby acknowledged, we do hereby undertake, promise and agree to exchange our respective properties as described herein, one for the other and the parties of the first part agree to furnish an abstract of title of their lands within 10 days from the date hereof, showing a fee simple title, subject to the incumbrance herein mentioned, and they further agree to give a warranty deed to the party of the second part for said land, subject to said incumbrance to be assumed by the party of the second part. The party of the second part agrees to execute and deliver to the party of the first part a warranty deed for said above described property conveying the same in fee simple, subject to the above mentioned incumbrance to be assumed by the party of the first part. The party of the second part also agrees to furnish an abstract of title of his lands within 10 days from the date hereof, showing a fee simple title, subject to the incumbrance herein mentioned.

"It is further understood and agreed by and between the parties hereto, that said deeds of the parties herein shall be executed and tendered to the other party within 30 days from the delivery of the abstracts, and each of the parties hereto undertake, promise and agree to fully consummate said exchange of properties within 30 days from the date of receiving said abstract, and neither party hereto shall have the right or authority to withdraw from, or refuse to complete said exchange of properties for any cause whatever, except where the title to some of the property to be exchanged shall be objected to as unmerchantable, and such objections, if any, shall be reduced to writing and personally served upon the other party, his agent or attorney, and if any objections are found to the title, the owner of the land is hereby given

30 days, in which to clear such objections, and if cleared the exchange of properties shall be consummated within 10 days thereafter, and this contract shall be fully consummated.

"The time in which each of the parties are to perform the acts and things herein agreed upon is hereby declared to be of the essence of this agreement.

"In witness whereof the parties have hereunto set their hands and seals in duplicate the day and year first above written. W. B. Brunton, (Seal)

"Witness. Opal M. Brunton, (Seal)

"P. E. Alvord. D. E. Gilman, (Seal)"

The parties did not exchange deeds nor do anything else in furtherance of the contract, except that, about November 15, 1913, defendants entered into possession of the Morrow county land and undertook its cultivation. Coming to a realization that they had not received what they bargained for, the defendants, about September 1, 1914, abandoned the Oregon property, moved back to their Clarke county farm, and refused to carry out the contract of exchange. The plaintiff at once brought an action for specific performance. From a decree dismissing the action, plaintiff appeals.

The contract was so indefinite and uncertain in some of its terms that appellant found himself under the necessity of including an action for its reformation as a preliminary to its specific performance. The agreement recites that one W. L. Twitchell, as the owner of the fee simple title to the Oregon land, is one of the contracting parties, while the agreement with the Bruntons is executed by D. E. Gilman instead of by Twitchell. The Oregon land is also described as 360 acres in "Section 3, Twp. 3 South of Range 26, East of W. M.," while in fact but 120 acres of the land involved lie in section 3, and the balance of 240 acres lies in section 4 of the same township and range. It may be conceded that the appellant was entitled to a reformation in these particulars, since the evidence showed that respondents were put in possession of the right lands and that they were informed that appellant was the real owner, although the record title was

at the time in the name of Twitchell. But, conceding the foregoing defects to have been duly corrected so as to warrant specific performance, the agreement is still defective in that the Brunton land is not sufficiently described to admit of its identification without resort to parol testimony. The description is as follows:

"The following described property situated in Clarke county, state of Washington, 48 acres more or less bounded upon north by Cedar creek and situated about one mile east of Etna, Wash., said property being the same property conveyed to the party of the first part by W. Tate and wife in 1912."

While it is the law that a reference in a contract or deed to another instrument which contains a description of the property justifies the examination of the two instruments together for the purpose of identifying the particular property referred to, the description herein does not come within the rule. The reference is not to an instrument containing a sufficient description, but merely declares the property is "the same property conveyed to the party of the first part [Bruntons] by W. Tate and wife in 1912." Parol evidence would be necessary to assist in determining what description was to be incorporated in the decree for specific performance. In *Thompson v. English*, 76 Wash. 23, 135 Pac. 664, in a case involving a somewhat similar description, this court said:

"The description of the property as contained in the contract was, 'Seventy-nine acres in section 30, township 2 N., Range 3, E. W. M., Clarke Co., Wash. Owner, A. E. English.' It will be observed that this description does not specify which 79 acres in section 30 was intended. To ascertain this fact, resort must be had to oral testimony. The description given cannot be applied to any definite property."

The fact that appellant was in possession of the deed from the Tates to the Bruntons in which the Brunton property was correctly described would be immaterial, in view of Brunton's testimony that he did not deliver the deed with the contract, and Gilman's testimony that he did not know how or when

he came into possession of the Tate deed. We hold that the description of the Clarke county land of the Bruntons was too indefinite for specific performance.

Further, we do not think appellant showed any title in himself such as a court of equity would compel the respondents to receive. The respondents denied the allegation of the complaint that appellant was the owner of the property. Appellant testified he was the owner, but the court did not receive the evidence as proper proof of title. Appellant introduced in evidence an abstract of title to the property, which was admitted only for the purpose of showing tender of the abstract and not as proof of title. But if the fact were otherwise, the abstract would not aid the appellant. The appellant testified that he tendered a deed for the land from Twitchell to Brunton some time in August or September, 1913. According to the abstract of title, a conveyance of this land is shown as having been made by Twitchell to Gilman on March 19, 1913, thus showing that, at the time Gilman tendered the Twitchell deed, the property stood in the name of Gilman himself. This was not a valid tender. This abstract discloses further peculiarities. In March, 1913, Gilman conveyed the land in controversy to Twitchell for an alleged consideration of $9,000, and at the same time, Twitchell gave a mortgage back for $3,000 as a part of the same transaction. On the same date, Twitchell redeeded the property to Gilman subject to the $3,000 mortgage. Then, on October 20, 1913, after the land had passed out of Twitchell's hands, the latter gave another mortgage to Gilman for $6,000. This latter mortgage was taken by Gilman at the time he was negotiating with respondents for an exchange of properties. The transactions with Twitchell hardly seem *bona fide*, but rather as if entered into for the purpose of giving the property a fictitious valuation. It is a significant fact also that the Twitchell $6,000 mortgage to Gilman was not satisfied until September 12, 1914, which was about two weeks after the tender and refusal of the Twitchell

deed to Brunton. In this connection, we might add that an abstract of title was never furnished by appellant to respondents until the trial, although the contract called for such delivery within ten days from date, and one provision of the contract was that "The time in which each of the parties are to perform the acts and things herein agreed upon is hereby declared to be of the essence of this agreement." The appellant has failed to show that he was ready, able and willing to perform. The evidence shows respondents demanded the abstract several times, in order to ascertain the condition of the title and close up the transaction. At the time the respondents abandoned the exchange of properties, some ten months after entering into the contract therefor, the appellant had not furnished the abstract, and the deed tendered by him was insufficient as being without the chain of title. It is true the appellant, at the time of instituting this action, tendered in court a deed from himself to the respondents, but it came too late to constitute performance of a contract which made time of the essence.

As an affirmative defense to this action for specific performance, the respondents set up that they had been misled by the representations of appellant's agent that the Gilman farm was worth $80 per acre, that they were ignorant of values in that locality, and that they informed such agent they were relying on his knowledge and representations. Appellant replied that the lands were fully worth that value, and further, that respondents went into possession after having made a full inspection of the lands. The evidence shows that respondent W. B. Brunton visited the lands and spent two days in the examination of them prior to signing the contract. At the time of his visit, ten acres were pointed out to him as rocky and unfit for cultivation, but nothing was said to him as to the rocky character of the remainder of the soil. After respondents went into possession and undertook to plow the land, they discovered that the land was full of rock which were not apparent on the casual inspection of the land.

Neighboring farmers testified as to the rocky character of the soil on this land, that it was poor land and not suitable for farming purposes. The evidence on the part of appellant was to the effect that the land was worth from $20 to $30 per acre, the latter figure as a basis for trading purposes. The witnesses in behalf of respondents testified the land was worth only from $10 to $20 per acre. Accepting from this evidence $20 per acre as a fair valuation, the land could not have been worth more than $7,200, which, with $500 worth of personal property included in the trade, would give $7,700 as the consideration. Under the terms of the contract, respondents were to pay $8,100 and also throw in their Clarke county farm upon which they put a valuation of $3,500, but for which appellant had negotiated a sale at $3,000. Accepting the latter figure as a fair valuation, the contract shows that respondents were to give $11,100 for property worth at the most no more than $7,700. The evidence shows that the respondents were utterly ignorant of the value of the Oregon lands, and that they relied on the representations of appellant's agent as to such values, and so informed the agent. The agent represented that no lands in Morrow county could be bought for less than $30 per acre, and that worse lands than these had been sold for $30 and $35 per acre. The agent assumed to have a knowledge of the value of Morrow county lands, and his representations cannot be relegated to the category of mere opinions as to value.

Nor can it be said that respondents are estopped by their examination of the lands to deny appellant's right to specific performance. This is not a case of rescission of an executed contract, in which courts are slow to grant relief where the proof of fraud is not clear and convincing and the complaining party has already consummated the contract after an inspection of the land. It is a case where resort is had to a court of conscience to enforce performance of an executory contract which would impose an inequitable burden upon one

of the parties. If the contract is shown to be unconscionable, inequitable and unfair, it is the duty of the court to deny enforcement, although the evidence might not be sufficient to justify rescission in the case of an executed contract. Taking the evidence most favorable to the appellant, it discloses that he is seeking to compel respondents to pay for property more than $3,000 in excess of its fair value. Even if there may not have been actionable fraud on the part of appellant, still a court of conscience will not lend its aid to the enforcement of a contract which is manifestly unfair. If the appellant deems himself injured, there remains to him his remedy in an action at law for damages for breach of contract. The law on this subject is well expressed by one of the standard text books as follows:

"So, a court of equity will not lend its aid to enforce a contract which is in any way unfair, inequitable or unconscionable. And gross inadequacy of consideration may be sufficient to justify the court in refusing a decree for specific performance even though there is no such fraud or the like as would require a cancellation. The contract may be perfectly legal, and yet it will not be specifically enforced if it is unreasonable or unconscionable, or if its enforcement will work a hardship or injustice to one of the parties." Elliott, Contracts, § 2305.

We think that the contract here sought to be enforced is indefinite in its description of the Clarke county land, that the contract is unconscionable, inequitable and unfair to the respondents, and that appellant was in default in tendering due performance on his part. Any one of the foregoing defects is sufficient of itself to defeat the action. The decree of the trial court is affirmed.

[No. 13464. *En Banc.* December 26, 1916.]

THE STATE OF WASHINGTON, *on the Relation of Puget Sound & Willapa Harbor Railway Company, Appellant,* v. NORTHERN PACIFIC RAILWAY COMPANY *et al.*, *Respondents.*[1]

RAILROADS—CROSSINGS—COST OF CONSTRUCTION AND MAINTENANCE—SAFETY DEVICES—APPORTIONMENT—STATUTES. Rem. Code, § 8733-6, subd. c, providing that the portion of the expense of making a railroad crossing at grade not chargeable to a county or city shall be apportioned between the railroad companies, means not only the expense of constructing the actual crossing, but the expense of constructing and maintaining such protective devices mentioned in § 8733-3 as the public service commission may require.

SAME—CROSSINGS—COST OF SAFETY DEVICES. In the absence of a statute to the contrary, a railroad desiring to cross another at grade must bear the expense of the crossing, including the cost of installing and maintaining such safety devices as the necessities of the case require.

SAME—CROSSINGS—SAFETY APPLIANCES—COSTS—APPORTIONMENT—DUE PROCESS. The railroad company first in time takes its right subject to being crossed by the line of another railway; and hence it is within the power of the state to impose upon a railroad company whose line is crossed at grade by another line the duty of installing and maintaining such safety devices as the conditions require for the safety of the public, and Rem. Code, § 8733-6, subd. c, requiring an apportionment of the costs thereof between the railroad companies does not violate the constitutional inhibition against taking private property for public use without compensation.

SAME. Under Rem. Code, § 8733-6, subd. c, providing that the portion of the expense of making a railroad crossing at grade not chargeable to a county or city shall be apportioned between the railroad companies, the public service commission cannot charge the entire cost against the road desiring the crossing, merely because the older company was first in point of time, where the record shows no equity in favor of one road over the other; since to require one road to bear all the expense is not an "apportionment."

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered April 17, 1916, affirming an order

[1]Reported in 161 Pac. 850.

of the public service commission, after a hearing before the court. Reversed.

F. M. Dudley, for appellant.

Geo. T. Reid, *J. W. Quick*, and *L. B. da Ponte*, for respondent Northern Pacific Railway Company.

The Attorney General and *Scott Z. Henderson*, *Assistant*, for respondent Public Service Commission.

FULLERTON, J.—The appellant, Puget Sound & Willapa Harbor Railway Company, in the construction of a line of railway through Lewis county, found it necessary to cross in two places the existing railway of the respondent Northern Pacific Railway Company. It desired to make the crossings at grade, and to that end petitioned the public service commission for leave so to do. A hearing was had on the petition, at which leave was granted to make the crossings as petitioned for, on condition that suitable interlocking devices be installed and maintained at the crossings. After the entry of the order granting the leave by the commission, the railway companies agreed upon the character of the device to be installed, but failed to agree on an apportionment of the expense for installing the same, the respondent refusing to bear any portion of the expense whatsoever. The appellant thereupon petitioned the public service commission to apportion such expense, and a hearing was had before that body upon this petition. At the conclusion of the hearing, the commission decided that the expense of installing the devices as well as their subsequent maintenance should be borne by the appellant company, and entered its order to that effect. The appellant caused the order to be reviewed in the superior court of Lewis county, where it was affirmed. This appeal is from the judgment of affirmance.

The provisions of the statute material to a consideration of the questions involved are found at §§ 8733-2, 8733-3, and

subdivision C. of § 8733-6 of Rem. Code, and are quoted in full:

"All railroads and extensions of railroads hereafter constructed shall cross existing railroads and highways by passing either over or under the same, when practicable, and shall in no instance cross any railroad or highway at grade without authority first being obtained from the commission to do so. All highways and extensions of highways hereafter laid out and constructed shall cross existing railroads by passing either over or under the same, when practicable, and shall in no instance cross any railroad at grade without authority first being obtained from the commission to do so: Provided, that this section shall not be construed to prohibit a railroad company from constructing tracks at grade across other tracks owned or operated by it within established yard limits. In determining whether a separation of grades is practicable, the commission shall take into consideration the amount and character of travel on the railroad and on the highway; the grade and alignment of the railroad and the highway; the cost of separating grades; the topography of the country, and all other circumstances and conditions naturally involved in such an inquiry." Id., § 8733-2.

"Whenever any railroad company desires to cross any highway or railroad at grade, it shall file a written petition with the commission setting forth the reasons why the crossing cannot be made either above or below grade, and whenever the county commissioners of any county, or the municipal authorities of any city or town, or the state officers authorized to lay out and construct state roads, desire to lay out or extend any highway across any railroad at grade, they shall file a written petition with the commission, setting forth the reasons why the crossing cannot be made either above or below grade. Upon receiving such petition the commission shall immediately investigate the same, giving at least ten days' notice to the railroad company or companies and the county or municipality affected thereby, of the time and place of such investigation, to the end that all parties interested may be present and be heard. If the highway involved is a state road, the state highway commissioner shall be notified of the time and place of hearing. The evidence introduced shall be reduced to writing and be filed by the commission. If the commission finds that it is not practicable to cross the

railroad or highway either above or below grade, it shall make and file a written order in the cause, granting the right and privilege to construct a grade crossing. The commission, in its discretion, may provide in the order authorizing the construction of a grade crossing, or at any subsequent time, that the railroad company shall install and maintain proper signals, warnings, flagmen, interlocking devices, or other devices or means to secure the safety of the public and its employees. If upon investigation the commission shall find that it is impracticable to construct an over-crossing or under-crossing on the established or proposed highway, and shall find that by deflecting the established or proposed highway a practicable and feasible over-crossing or under-crossing or a safer grade crossing can be provided, it shall continue the hearing on the petition and hold a supplemental hearing thereon. At least ten days' notice of the time and place of such supplemental hearing shall be given to all land owners that may be affected by the proposed change in location of the highway. At such supplemental hearing the commission shall inquire into the propriety, advisability and necessity of changing and deflecting the highway as proposed for the purpose of securing an over-crossing, under-crossing, or safer grade crossing. If the proposed change in route of the highway involves the abandonment and vacation of a portion of an established highway, the owners of land contiguous to the portion of the highway to be vacated and abandoned shall, in like manner, be notified of the time and place of the supplemental hearing. At the conclusion of the hearing on the petition, the commission shall make and file its findings of fact in writing concerning the matters inquired into, and shall determine the location of the crossing which may be constructed, and whether the same shall be an under-crossing, over-crossing, or grade crossing, and shall determine whether or not any proposed change in the route of an existing highway, or the abandonment of a portion thereof is advisable or necessary to secure an over-crossing, under-crossing, or safer grade crossing. If the commission shall find and determine that a change in route of an existing highway, or abandonment and vacation of a portion thereof is necessary or advisable, it shall further find and determine what private lands, property, or property rights, if any, it is necessary to take, damage, or injuriously affect, for the purpose of laying out

and constructing the highway along a new route, and what private lands, property or property rights, if any, will be affected by the proposed abandonment and vacation of a portion of an existing highway. The lands, property, and property rights found necessary to be taken, damaged, or affected shall be described in said findings with reasonable accuracy, and the right to take, damage or injuriously affect the same shall be acquired as hereinafter provided. In any action brought to acquire the right to take, damage, or injuriously affect any such lands, property, or property rights, the findings of the commission shall be conclusive as to the necessity for taking, damaging, or injuriously affecting the same. A copy of said findings shall be served upon all parties to the cause." Id., § 8733-3.

"Whenever two or more lines of railroad owned or operated by different companies cross a highway, or each other, by an over-crossing, under-crossing or grade crossing required or permitted by this act or by an order of the commission, the portion of the expense of making such crossing not chargeable to any municipality, county, or to the state, shall be apportioned between said railroad companies by the commission unless said companies shall mutually agree upon an apportionment. If it becomes necessary for the commission to make an apportionment between the railroad companies, a hearing for that purpose shall be held, at least ten days' notice of which shall be given." Id., § 8733-6 c.

It is the contention of the appellant that these statutes require an apportionment of the expense of installing and maintaining such crossing devices as the commission may require to be installed for the protection of the public, and hence that the order of the commission in this instance, since it required the appellant to bear the whole expense of installing and maintaining the interlocking device required by its order, is in violation of the statute, and is otherwise unjust and inequitable. On the other hand, it is contended by respondent that the statute, properly construed, relates only to the expense of the actual crossing, of which an interlocking device is not a necessary part; and further, that to construe the statute in such a way as to compel the senior road to pay

any part of the expense of constructing a crossing, or the devices required to be installed in connection therewith, is to render the statute unconstitutional, since it is to permit a taking of the property of the senior road for the benefit of the junior without any corresponding benefit, and hence a taking without compensation.

Noticing first the question of construction, it must be confessed that the statute is not entirely clear as to its meaning. The language used, giving it a literal construction, seems to support the respondent's contention. It will be noticed that § 8733-3 appears to refer to the interlocking and other devices which the public service commission may in its discretion require to be installed by "the railroad company" for the protection of the public, as something in addition to the actual construction of the crossing, while subdivision c. of § 8733-6 makes no reference to these devices, but refers to the "expense of making such crossing" only. The railroad company named in the first section must, from the context, refer to the railroad company desiring to make the crossing, not to the railroad company whose tracks are crossed; and the requirement that it shall install and maintain the protective devices means, in the absence of explanatory words, that it shall install and maintain them at its own expense. But to construe the language thus literally seems to conflict with the spirit and intent of the act, and we think that the later section, in its reference to the expense of the crossing, means not only the expense of constructing the actual crossing, but the expense of constructing and maintaining such protective devices as the commission may require to be constructed and maintained therewith. The expense of constructing and maintaining the actual crossing is, the record shows, but nominal when compared with the cost of installing and maintaining the protective devices. It is, moreover, wholly for the benefit of the crossing road, while the protective devices can be said to be for the benefit of both roads, since they lessen the danger of accidents and permit a more economical oper-

ation of both. It is not, therefore, to be supposed that the legislature, in providing for an apportionment of the expense, referred to this lesser consideration to the exclusion of the one of so much greater importance, and we cannot so hold. "The real meaning of a statute is to be ascertained and declared, even though it seems to conflict with the words of the statute." *Landers v. Smith*, 78 Me. 212, 3 Atl. 463; *Orono v. Bangor R. & Elec. Co.*, 105 Me. 428, 74 Atl. 1022; *Minneapolis & St. L. R. Co. v. Gowrie & N. W. R. Co.*, 123 Iowa 543, 99 N. W. 181.

Passing to the constitutional question, it must be remembered when considering it that the appellant does not seek to have the expense of constructing the crossing proper apportioned between itself and respondent, but seeks only to have so apportioned the expense of installing and maintaining the interlocking device required by the public service commission. It must be remembered, also, that an interlocking device is no part of the crossing proper. Crossings at grade existed long prior to the invention of such devices, and many grade crossings now exist and are in use in this state where no such device is installed. The device is a safety device, having for its primary purpose the protection of the public from accident, and a secondary purpose of enabling the crossing roads to operate their trains more economically, in that it does away with the necessity of stopping before crossing the opposing track other than when signaled so to do. Rem. Code, § 8626-69.

The right of one railroad company to construct its tracks across the tracks of another company, while guaranteed by the constitution and statutes of this state, exists without such guaranty. The right to cross could be condemned in the same manner the right to cross other property was condemned. The great weight of authority is, however, in the absence of a statute to the contrary, to the effect that the crossing company must bear the expense of the crossing. This includes not only the cost of constructing the grades and

laying the tracks, but the cost of installing and maintaining such safety devices as the necessities of the particular case might require. *Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co.*, 62 Mich. 564, 29 N. W. 500, 4 Am. St. 875; *State ex rel. Minneapolis v. St. Paul, M. & M. R. Co.*, 98 Minn. 380, 108 N. W. 261, 120 Am. St. 581, 28 L. R. A. (N. S.) 298; *Chicago, M. & St. P. R. Co. v. Milwaukee*, 97 Wis. 418, 72 N. W. 1118; *State ex rel. Northern Pac. R. Co. v. Railroad Commission of Wisconsin*, 140 Wis. 145, 121 N. W. 919; *Flint & P. M. R. Co. v. Detroit & B. C. R. Co.*, 64 Mich. 350, 31 N. W. 281; *Butte, A. & P. R. Co. v. Montana U. R. Co.*, 16 Mont. 504, 41 Pac. 232, 50 Am. St. 508, 31 L. R. A. 298; *West Jersey & S. R. Co. v. Atlantic City & S. Traction Co.*, 65 N. J. Eq. 613, 56 Atl. 890; *Winona & S. W. R. Co. v. Chicago, Milwaukee & St. Paul R. Co.*, 50 Minn. 300, 52 N. W. 657; *Elkins Elec. R. Co. v. Western Maryland R. Co.*, 163 Fed. 724; *Chicago & W. I. R. Co. v. Englewood Conn. R. Co.*, 115 Ill. 375, 4 N. E. 246, 56 Am. Rep. 173.

In our own case of *State ex rel. North Coast R. v. Northern Pac. R. Co.*, 49 Wash. 78, 94 Pac. 907, a proceeding brought by the relator to cross the track of the defendant at grade, we held it to be the duty of the relator to bear the expense of making and maintaining the crossing, as well as an interlocking device found necessary to be installed for protective purposes. Announcing the same principle, although presenting different states of facts, are the cases: *State ex rel. Union Lumber Co. v. Superior Court*, 70 Wash. 540, 127 Pac. 109; *Northern Pac. R. Co. v. Union Lumber Co.*, 76 Wash. 563, 137 Pac. 306; *Spokane v. Spokane & Inland Empire R. Co.*, 75 Wash. 651, 135 Pac. 636. The grounds upon which the principle was rested in some of these cases lend strong color to the contention of the respondent, but it must be remembered that the cases were determined in the absence of statutes requiring an apportionment of costs and without that thought being in the mind of the court when the opinions were framed. The

language of the court must be construed with reference to the question actually before it, and since the question now before us was not presented in any of them, they cannot be said to be conclusive of it.

A railroad company which has procured a right of way for its line and laid tracks thereover clearly has a vested property right therein, and any other company crossing such right of way is bound to make compensation for the property actually taken and damaged, regardless of any statutory provision to the contrary. But a railway company first in time acquires no exclusive right to the territory through which it passes or exclusive right to operate its road in any particular manner. Both under the principles of the common law and by the express provisions of the constitution and statutes of this state, its line was subject to being crossed by the line of another railroad company. The language of the supreme court of the United States, in *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, is applicable. It is there said:

"The plaintiff in error took its charter subject to the power of the state to provide for the safety of the public, in so far as the safety of the lives and persons of the people were involved in the operation of the railroad. The company laid its tracks subject to the condition necessarily implied that their use could be so regulated by competent authority as to insure the public safety. And as all property, whether owned by private persons or by corporations, is held subject to the authority of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people, it is not a condition of the exercise of that authority that the state shall indemnify the owners of property for the damage or injury resulting from its exercise. Property thus damaged or injured is not, within the meaning of the constitution, taken for public use, nor is the owner deprived of it without due process of law. The requirement that compensation be made for private property taken for public use imposes no restriction upon the inherent power of the state by reasonable

regulations to protect the lives and secure the safety of the people. In the recent case of *N. Y. & N. E. Railroad v. Bristol*, 151 U. S. 556, 567, this court declared it to be thoroughly established that the inhibitions of the constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. 'The governmental power of self-protection,' the court said, 'cannot be contracted away, nor can the exercise of rights granted, nor the use of property be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.' See *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 671."

It is, therefore, within the power of the state, whenever it deems the public safety may so require, to impose upon railway companies whose tracks cross each other at grade the duty of installing and maintaining at such crossing such safety devices as the conditions may require. And since such devices are not necessary to the successful operation of the road but are required for the safety of the public, it would seem to follow that the state might provide, without violating the constitutional inhibition against the taking of private property for a public use, that the expense of installing and maintaining such devices could be apportioned between two railway companies, even though the installation is required to be made at the time when the one is constructing a new track across the existing track of another. We so hold, and while we think the rule applicable to any form of safety device, we think it particularly applicable to the one in question, since it has, as we say, the double purpose of protecting the public and enabling each of the roads to more economically operate its trains.

It follows from this that the public service commission and the trial court were in error in imposing the entire obligation of installing and maintaining the required interlocking de-

vice upon the appellant, unless it can be said that the power to apportion the expense between the companies includes the power to impose it all upon one of the companies. In *Toledo R. & Terminal Co. v. Lima & Toledo Traction Co.*, 79 Ohio St. 136, 86 N. E. 515, the court held that an apportionment of the costs did not necessarily mean an equal apportionment and, in a subsequent appeal of the same case, said that to require one company to bear all of the expense was not an apportionment, the true rule appearing to be that a substantial apportionment is required.

So interpreting the statute, we cannot conclude in this instance that the order of the commission can stand. The record shows no equity in favor of the one road over the other. The order was based entirely on the fact that one was first in time, and since we conclude that this is not sufficient under the statute to relieve it from a share of the expense, it follows that the burden of installing and maintaining the interlocking device should be divided equally between the companies.

The judgment appealed from is reversed, and the cause remanded with instructions to direct the public service commission to apportion the expense of installing and maintaining the interlocking device mentioned equally between the railroad companies interested.

MOUNT, MAIN, ELLIS, PARKER, and CHADWICK, JJ., concur.

HOLCOMB, J. (concurring)—I concur in the result, assuming that the public service commission will apportion the cost as suggested in *Toledo R. & Terminal Co. v. Lima & Toledo Traction Co.*, 79 Ohio St. 136, 86 N. E. 515. I do not agree that the railroad first occupying a right of way has no superior right or equity as against a subsequent occupier of the right of way for the purpose of crossing. As against it, I think the first occupier has a very superior position and right. As against the sovereign, of course, it has

not, but in apportioning the costs involved here, the superior and prior position of the first occupier should be given very great advantage.

[No. 13511. Department One. December 26, 1916.]

F. P. SEARLE, *Plaintiff*, v. JOHN D. BIRD *et al.*, *Defendants*, SNOHOMISH LAND COMPANY, *Appellant*, PACIFIC COAST PIPE COMPANY *et al.*, *Respondents*.[1]

JUDGMENT—LIEN—PROPERTY AFFECTED—OPTIONS — TITLE. Where an absolute deed was made under an option agreement providing that the deed should be considered a mortgage for the purpose of securing a loan of $2,000, and giving the grantee the option to purchase, the title to the property remained in the grantors, and is subject to the lien of judgments recovered against them, in the order of their priority.

GARNISHMENT—PROPERTY SUBJECT — LIEN OF OUTSTANDING JUDGMENT—PRIORITIES. A judgment lien against the real property of the judgment debtors held subject to option given by them, takes precedence over subsequent writs of garnishment against the purchase price of the property, paid into court by the purchaser on exercising the option; since a garnishor can claim no greater interest in the fund than the judgment debtors had.

APPEAL—RECORD—REVIEW—STATEMENT OF FACTS. In the absence of a statement of facts, the findings are conclusive and the evidence cannot be reviewed.

Appeal from a judgment of the superior court for King county, Ronald, J., entered January 17, 1916, upon findings in favor of certain defendants, adjudging the rights of judgment lien claimants to a fund deposited in court, in an action for specific performance. Affirmed.

Wm. A. Johnson, for appellant.

Wright, Kelleher & Allen, for respondent Frederick & Nelson.

A. W. Buddress, for respondent Pacific Coast Pipe Company.

[1]Reported in 161 Pac. 838.

CHADWICK, J.—The respondent Pacific Coast Pipe Company and the Snohomish Land Company are judgment creditors of John D. Bird and wife. At the time the judgments were obtained, plaintiff, F. P. Searle, had and held an option agreement to purchase certain lands. The material parts of the agreement are as follows:

"This agreement made and entered into this 10th day of June, 1914, by and between John D. Bird and Ida M. Bird, husband and wife, parties of the first part, and F. P. Searle, party of the second part, Witnesseth: That whereas the parties of the first part, have by deed dated June 5th, 1914, transferred and conveyed to the party of the second part, the following described real estate, to wit [omitting description].

"And whereas, said transfer, although appearing on its face to be an absolute deed from parties of the first part to party of the second part, of the property therein described and heretofore described herein, was intended as a mortgage according to the following terms, conditions and stipulations, to wit:

"It is mutually agreed by and between the parties hereto, that coincident with the signing and delivery of this agreement, the Tolt State Bank has loaned to the parties of the first part on their promissory note, the sum of $2,000 and that the transfer to the party of the second part hereto, of [here description of same premises], by deed dated June 5, 1914, was made to said party of the second part, who is cashier of said Tolt State Bank, for the purpose of securing and as security for said loan of $2,000. That said party of the second part holds the title to said above described property as evidenced by said deed, in trust, for the use and benefit of the Tolt State Bank, as such security.

"It is further mutually agreed by and between the parties hereto, that the party of the second part hereto has and he is hereby given an option to purchase said real estate during any time hereafter, on or before one year from date for the price here and now agreed upon, to wit: The sum of $4,000.

"It is further mutually agreed that if the party of the second part hereto exercises his option to purchase said premises, that they shall be delivered to him free and clear of all liens and encumbrances whatsoever, except the $2,000

mortgage thereon, which he hereby agrees to assume as a part of the purchase price.

"It is further mutually agreed by and between the parties hereto that this agreement nor any interest therein, is not assignable, by the parties of the first part hereto, without the written consent of the parties of the second part hereto first had and obtained, while there are any record liens against said property other than the mortgage to Tolt State Bank herein referred to."

Plaintiff, having decided to exercise his option, made tender and demanded a deed, which being refused, he began this action to compel a specific performance, paying into the court the amount he admitted to be due, and thereafter, by supplemental complaint, making the appellant and respondent parties thereto. The respondent answered, setting up its judgment and claiming a lien upon the land to the extent of its judgment, and asking that the money paid into the registry of the court be given to it in the order of its priority in satisfaction of its judgment. There were other answering defendants claiming liens, but they do not appear in this court, and we will not discuss their rights or their interest.

Appellant assumed a different theory of the law governing the transaction between plaintiff and defendants, and accordingly caused a writ of garnishment to be issued directed to plaintiff, claiming that he had in his possession and control moneys and property belonging to the defendants Bird. The garnishment is predicated upon the theory that an absolute deed had been made by Bird to Searle, and that the legal title was in Searle; that the Birds had no more than an equitable interest in the land to which—under the statute, Rem. Code, § 445, providing that a judgment is a lien only upon the legal title or an estate of inheritance—no lien would attach (*Phoenix Min. & Mill Co. v. Scott*, 20 Wash. 48, 54 Pac. 777); and that appellant, being first in time with its garnishment, is entitled to recover.

We have not been favored with a statement of facts. The case comes to us with the rights of the plaintiff, Searle, and defendants Bird defined by the loan and the option agreement. The description in the option agreement of a deed theretofore executed as an "absolute deed" is a conclusion of the parties and, in the absence of a showing to the contrary, we will not say, in the light of other provisions in the option agreement, which was recorded a few days after its execution, and the subsequent conduct of the parties, that it was their intent to pass the legal title to the lands; but hold, rather, that the legal title was, at all times, in the defendants Bird, and subject to the lien of any judgment obtained against them.

The deed may never have been delivered, or it may have been redelivered upon, or after, the execution of the option agreement. It was never recorded, and beyond all these things, the very subject-matter of the suit of plaintiff is to *compel the execution* of a deed. There was no showing that the rights of the parties did not rest in the option agreement and that alone. That they did, must necessarily be so, for the lower court has found as a fact that the legal title was, at all times, in the defendants Bird.

The rights of the original parties to the transaction depending upon the option agreement, the case falls within the rule of *Tieton Hotel Co. v. Manheim*, 75 Wash. 641, 135 Pac. 658; *Ihrke v. Continental Life Ins. & Inv. Co.*, 91 Wash. 342, 157 Pac. 866, and cases there cited.

Furthermore, it is a rule established in this state that a garnishor can claim no other or greater interest in a fund than the judgment debtor could have claimed. The rights of the judgment debtors in the land are subject to the claims of their judgment creditors in the order of their priority. The respondent is first in time and, therefore, first in right. 20 Cyc. 1060; *Bellingham Bay Boom Co. v. Brisbois*, 14 Wash. 173, 44 Pac. 153, 46 Pac. 238; *Beaston v. Portland Trust & Sav. Bank*, 89 Wash. 627, 155 Pac. 162.

Much of the briefs is given up to the legal effect of certain deeds executed by defendants Bird to a brother, which are dated at a prior time but recorded subsequently to the entry of the several judgments. These deeds were challenged and found by the court to be fraudulent as against the rights of the judgment creditors. Without a statement of facts, we cannot inquire into this phase of the controversy. We must accept the finding of the court as final.

Judgment affirmed.

MORRIS, C. J., MAIN, MOUNT, and ELLIS, JJ., concur.

[No. 13557. Department Two. December 26, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v. W. E. BUFFUM, *Appellant*.[1]

APPEAL—RECORD—STATEMENT OF FACTS. Affidavits used upon the hearing of a motion cannot be considered on appeal unless brought up by statement of facts.

CRIMINAL LAW—APPEAL—DUTY TO PROSECUTE—DILIGENCE. It is the duty of defendant appealing from a conviction in justice court to diligently prosecute his appeal; and a delay of over five months after perfecting the appeal, with no excuse shown, warrants a dismissal of the appeal for want of diligence.

Appeal from an order of the superior court for Pierce county, Card, J., entered March 15, 1916, dismissing an appeal from a conviction in a justice court, for want of diligence. Affirmed.

Frank G. Riley, for appellant.

Fred G. Remann and *J. W. Selden*, for respondent.

FULLERTON, J.—On September 1, 1915, the appellant, W. E. Buffum, was convicted in one of the justice's courts of Pierce county of the offense of cruelty to animals. On the pronouncement of the judgment of conviction, he orally gave

[1]Reported in 161 Pac. 832.

notice of appeal from the judgment to the superior court of Pierce county, perfecting the appeal on September 11, 1915, by filing a bond conditioned that he would prosecute the appeal and abide the judgment of the court thereon. Nothing further was done with the appeal by Buffum, and on February 23, 1916, the prosecuting attorney moved to dismiss it on the ground that it had not been diligently prosecuted. This motion the court granted, and Buffum appeals to this court.

There is in the transcript a copy of an affidavit filed by Buffum in which he sought to excuse his apparent want of diligence in failing to prosecute his appeal, but we have held in a long line of cases that matters of evidence introduced at a hearing or on a trial in the court below cannot be brought before this court by certification in the transcript or in any other manner than by a statement of facts; this on the principle that it is only from a statement of facts that this court can know what was before the trial court in the way of evidence. This affidavit, therefore, is not before us and cannot be considered in the determination of the appeal. It follows from this that, if it was the appellant's duty to prosecute the appeal, and if the time elapsing between the date of the appeal and the date of the motion to dismiss it was longer than a reasonable time for such purpose, the court did not err in its order of dismissal.

The appellant controverts both of these propositions, citing to the first the case of *State v. Hall*, 64 Wash. 99, 116 Pac. 593. But this case was rested on the facts shown, the court holding that the record showed that there was no intention on the part of the appellant to abandon the appeal. It was not held that the appellant owed no duty to prosecute his appeal. On the contrary, it was held that the state's motion to affirm the judgment of guilty entered in the justice's court should not be granted, conceding that it was the appellant's duty to bring the case to a hearing. On the other hand, we had theretofore decided in the case of *State*

v. Parmeter, 49 Wash. 435, 95 Pac. 1012, that it was the duty of a defendant appealing from a judgment of conviction in a justice's court to diligently prosecute his appeal, saying that he was entitled to a trial in the superior court by reason of his appeal only if diligently prosecuted. The principle of the case was reaffirmed in the later case of *State v. Jones*, 80 Wash. 335, 141 Pac. 700. Since the burden of prosecuting the appeal is on the defendant and not the state, it must follow that the state is entitled to a dismissal when a reasonable time elapses after the appeal is taken and no effort is made on the part of appellant to prosecute it to a final conclusion.

As to the second question, an examination of the dates given will show that a period of over five months elapsed after the appeal was perfected without action being taken on the part of appellant, and no reason shown which we are permitted to consider which excused the delay. Seemingly this is ample time in which to bring the cause on for hearing before a court open on every judicial day and which sits with a jury once in every month. On the face of the record, therefore, we cannot say that the court abused its discretion in dismissing the appeal, and the order of dismissal should stand affirmed. It is so directed.

MORRIS, C. J., MOUNT, HOLCOMB, and PARKER, JJ., concur.

[No. 13621. Department One. December 26, 1916.]

F. M. FAIRBANKS, *Respondent*, v. SHADY BROOK MILLING COMPANY, *Appellant*, GARDEN CITY MILLING COMPANY, *Defendant*.[1]

ABATEMENT AND REVIVAL—ANOTHER ACTION PENDING — PRIORITY. After judgment, a writ of garnishment to impound a fund fraudulently conveyed by the judgment debtor is not an independent action, but merely ancillary, although the fraudulent vendee was brought into the proceeding; hence an action against the fraudulent vendee, commenced after judgment but prior to the garnishment, is not a prior action for the same cause that can be pleaded to abate the garnishment proceeding.

SAME. The action first in time will stand against a motion to abate on the ground of another action pending.

SAME—ANOTHER ACTION PENDING—IDENTITY OF CAUSE AND REMEDIES. An action against the fraudulent vendee of all the assets of an insolvent corporation, being an action to recover money, cannot be pleaded in abatement of a prior garnishment and interpleader brought to recover a fund of the insolvent; since one is brought to establish a right and the other in pursuit of a remedy; and since actions *in personam* and proceedings *in rem* do not necessarily conflict.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered February 7, 1916, upon findings in favor of the plaintiff, adjudging title to money deposited in court by a garnishee, after a trial to the court. Affirmed.

Benton Embree, for appellant.

J. Grattan O'Bryan, for respondent.

CHADWICK, J.—On May 10th, 1915, respondent, Fairbanks, obtained a judgment against the Garden City Milling Company, a corporation. The Garden City Milling Company had, at some time prior to the rendition of the judgment, sold all of its assets, including outstanding accounts, to the Shady Brook Milling Company. In June,

[1]Reported in 161 Pac. 840.

1915, respondent began an action in the superior court of Walla Walla county against the Shady Brook Milling Company, setting forth his judgment against the Garden City Milling Company, an execution returned *nulla bona*, and that the transfer of its assets, by the Garden City Milling Company to the Shady Brook Milling Company, was in fraud of the rights of creditors, and praying that the Shady Brook Milling Company be held to account for the property so conveyed to it to the extent of satisfying the judgment theretofore returned in the King county court.

Thereafter, and while the case was pending in the Walla Walla court upon demurrer to the complaint, respondent caused a writ of garnishment to be issued upon his judgment theretofore obtained in the superior court of King county, and directed to the Western Produce Company of Everett, Washington. The Western Produce Company answered, admitting its liability to the Garden City Milling Company, and alleging further that the amount so owing by it was claimed by the Shady Brook Milling Company as the assignee of the Garden City Milling Company. Whereupon it paid the amount so owing into the registry of the court. Pending these proceedings, counsel for the Shady Brook Milling Company either withdrew his demurrer, or permitted it to be overruled by the superior court of Walla Walla county, and thereupon answered to the merits.

When the answer of the garnishee in King county came in, respondent obtained an order of the court requiring the Shady Brook Milling Company to come into, and interplead, in the garnishment proceeding. It answered, pleading, among other things, that the action in King county should abate because of a prior action pending between the same parties in the same cause in Walla Walla county, that is, the action upon the judgment theretofore obtained against the Garden City Milling Company in King county.

The court below made findings that the assets of the Garden City Milling Company had been transferred in fraud of

the rights of creditors, and directed that the amount paid into the registry of the court by the garnishee be turned over to the respondent in satisfaction of his judgment.

Appellant contends that there is another action — the Walla Walla suit—pending between the same parties in the same cause, and calls our attention to the fact that, notwithstanding other findings and the judgment of the court below, it was there actually so held. Respondent contends that the garnishment proceeding is but ancillary to its former judgment and is not, in any sense, an action subsequent in time, or the same in character, as the Walla Walla action, or, if it be the same, the King county action is first in time. Notwithstanding the finding of the court that there was, at the time of the rendition of the judgment, another action pending, we are inclined to its conclusion rather than to its finding, and to hold that respondent is entitled to recover.

There are several familiar tests which are resorted to by the courts to determine whether a second action falls within the rule and is to be abated as "another action pending." It must appear that there is an identity of subject-matter, and that the relief sought in the second suit is the same as in the first suit, or that a judgment, if rendered on the merits, would be conclusive between the parties and could be pleaded in bar of the second action. A substantial difference in the relief sought is sufficient to overcome the bar. 1 Cyc. 27, 28.

Respondent had begun an action against the principal defendant and had prosecuted it to judgment. The remedies incident to the collection of that judgment, whether by garnishment or by creditor's bill, cannot, in any sense, be regarded as independent actions, notwithstanding respondent obtained what seems to have been an unnecessary order, that is, that appellant should interplead in the garnishment proceeding. After judgment obtained in the original action, respondent could lawfully pursue all remedies of which he

might avail himself to work a satisfaction of his judgment. *Granger v. Judge of Wayne Circuit*, 27 Mich. 405, 15 Am. Rep. 195. It is the action first in time that must stand as against a motion to abate, where two actions are pending. *Olson v. Seldovia Salmon Co.*, 89 Wash. 547, 154 Pac. 1107. The motion might be directed to the action pending in Walla Walla county to the extent, at least, that it would affect the impounded money, but a motion under the statute would not be available to abate the action in King county, which we regard as the one prior in time.

The action in Walla Walla county is not a prior action for the same cause and between the same parties. The action in King county is to recover money; the action in Walla Walla county is to reach property in the hands of a third party held in fraud of the judgment creditor. The one action established a right; the other is waged in the pursuit of a remedy. The original character or temporal standing of actions is not changed by subsequent proceedings had in either. It follows that appellant's contention, that its interplea in the garnishment proceeding and issue joined thereon makes an original action second in time to the Walla Walla action, is not sound.

"B" sued "V" in ejectment. Pending the action, "V" died. After a time, "B" proceeded by *scire facias* to make "V's" administrators parties. At the time, a former *scire facias* had been sued out. It was shown that the first *scire facias* had been dismissed since the issuing of the second, but this is not material to our inquiry as will be seen by reference to the case, *Heath v. Bates*, 70 Ga. 633, for the court held that a *scire facias* to make parties (our statute, permitting the court to compel an interpleader, performs the same office) was a proceeding in the original action and not the commencement of a new action. See 1 C. J. 49.

Or, if we treat the garnishment and interpleader as an action independent of the original action in King county, appellant is in no better position. We have frequently held

that a garnishment proceeding is, in nature, a proceeding *in rem*. The suit in Walla Walla is an action *in personam*.

"Proceedings *in rem* and *in personam* do not necessarily conflict with each other, until satisfaction is obtained in one, and therefore cannot be pleaded in abatement of each other." 1 R. C. L. p. 14, § 4.

See, also, *Granger v. Judge of Wayne Circuit*, *supra*.

Affirmed.

MORRIS, C. J., MAIN, MOUNT, and ELLIS, JJ., concur.

[No. 13624. Department One. December 26, 1916.]

JOSEPH ZELLERS, *Appellant*, v. SEATTLE LODGE No. 92 BENEVOLENT AND PROTECTIVE ORDER OF ELKS *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS—STREETS—SIDEWALKS—SNOW AND ICE—LIABILITY OF OWNERS—COMPLAINT. A complaint charging that defendant "carelessly, negligently and unlawfully" allowed snow and ice to accumulate upon its sidewalk, states only a conclusion and is insufficient, where the facts alleged show that the snow and ice accumulated in a short time through natural causes, and no ordinance was pleaded making it the duty of defendant to keep the sidewalk clear of snow and ice.

SAME—LIABILITY OF OWNER. The abutting owner owes no duty to pedestrians to keep the sidewalk free from snow and ice, in the absence of any statute or ordinance requiring him to do so.

Appeal from a judgment of the superior court for King county, Smith, J., entered May 24, 1916, upon sustaining a demurrer to the complaint, dismissing an action for personal injuries sustained in a fall upon a sidewalk. Affirmed.

J. P. Ball and *Wm. T. C. Ball*, for appellant.

Geo. H. Rummens (*Geo. F. Aust* and *Farrell, Kane & Stratton*, of counsel), for respondents.

[1]Reported in 161 Pac. 834.

PER CURIAM.—Action for personal injuries. It is alleged in the complaint, in substance, that the Elks Investment and Construction Company, a corporation, is the owner of a lot and building located at the southwest corner of Fourth avenue and Spring street, in the city of Seattle; that Seattle Lodge No. 92, Benevolent and Protective Order of Elks, a voluntary unincorporated association, was the lessee in possession of the premises; that Fourth avenue and Spring street are public highways and principal thoroughfares of the city, with a decided downward pitch from Fourth avenue on Spring street westward; that during the first three days of February, 1916, the city of Seattle was visited by a heavy snow storm, with thaws and freezes, which covered the streets and sidewalks of the city with snow and ice to a great depth; that defendants "carelessly, negligently and unlawfully" allowed such snow and ice to accumulate and be on the sidewalk adjoining their premises; that on February 4, 1916, plaintiff, while walking along Spring street adjoining defendants' premises, slipped on the snow and ice, fell and sustained injuries for which he demands judgment in the sum of $10,700. The court sustained a general demurrer to the complaint. Plaintiff refusing to plead further, a judgment of dismissal was entered. Plaintiff appealed.

Appellant argues that, because the complaint charged that respondents "carelessly, negligently and unlawfully" permitted the snow and ice to accumulate, the court erred in sustaining the demurrer. This presents the sole question for our determination.

It will be noticed that the facts alleged show that the snow and ice accumulated in a short time and through natural causes. There is no allegation of any facts constituting negligence at common law. *Griswold v. Camp*, 149 Wis. 399, 135 N. W. 754. Nor is there pleaded any ordinance of the city making it the duty of the abutting property owner to keep the sidewalks clear of snow and ice so accumulating, and

we have no statute imposing such duty. The general allegation that respondents carelessly, negligently and unlawfully permitted snow and ice to accumulate is, therefore, unsupported by any specific allegation of fact. It is a mere conclusion not following from any of the facts alleged. The law is thus succinctly expressed in 13 R. C. L. p. 415, § 341:

"In the absence of a statutory provision to the contrary, the owner or occupant of property owes no duty to pedestrians to keep the sidewalk in front of it free from ice and snow coming thereon from natural causes, or to guard against the risk of accident by scattering ashes or using other like precautions, and will not be liable in damages to persons injured by reason of his failure to do so."

The text quoted is amply sustained in all of its breadth by the authorities. *Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189; *Kirby v. Boylston Market Ass'n*, 14 Gray (Mass.) 249, 74 Am. Dec. 682; *Dahlin v. Walsh*, 192 Mass. 163, 77 N. E. 830, 6 L. R. A. (N. S.) 615; *McGrath v. Misch*, 29 R. I. 49, 69 Atl. 8, 132 Am. St. 798; *New Castle v. Kurtz* (210 Pa. St. 183, 59 Atl. 989, 105 Am. St. 798, 69 L. R. A. 488), 1 Ann. Cas. 943, and note; *Brown v. Wysong*, 1 App. Div. 423, 37 N. Y. Supp. 281; *Hunter v. Wanamaker*, 17 W. N. C. (Pa.) 232, 2 Atl. 507; 28 Cyc. 1438. No authority to the contrary has been cited and we know of none.

This is not a case involving an artificial turning of water onto a street which by freezing created a dangerous condition amounting to a nuisance produced through the agency of the property owner. Nothing of the kind is alleged. A city is, of course, as a general rule, primarily liable for negligence in the care of its streets, but even as against the city, the facts here alleged would hardly sustain the conclusion of negligence. *Calder v. Walla Walla*, 6 Wash. 377, 33 Pac. 1054; *Taylor v. Spokane*, 91 Wash. 629, 158 Pac. 478; *Griswold v. Camp*, *supra*.

Even had we a statute requiring the property owner to remove from abutting sidewalks natural accumulations of

snow and ice, or had a violation of an ordinance to that effect been pleaded, there would still be grave doubt whether, under the authorities, a neglect of that duty would of itself create a liability against it in favor of individuals. *Hartsell v. City of Asheville*, 164 N. C. 193, 80 S. E. 226; *Griswold v. Camp*, *supra*. See, also, note, *Dahlin v. Walsh* (Mass.), 6 L. R. A. (N. S.) 616. We reserve the decision of that question until we meet a case presenting it.

In any view of the matter, the complaint here failed to state a cause of action. Judgment affirmed.

[No. 13642. Department Two. December 26, 1916.]

DU PONT DE NEMOURS POWDER COMPANY, *Appellant*, v. WILLIAM VIRGES, *as Trustee*, *Respondent*, v. NATIONAL REALTY COMPANY *et al.*, *Defendants*.[1]

MORTGAGES—FORECLOSURE—SUCCESSIVE SALES—STATUTES. It is not necessary to order successive sales when different mortgages are foreclosed in one suit, where the statute, Rem. Code, § 1118, providing that the court shall order the mortgaged property sold to satisfy the mortgage and costs of action, does not require separate sales.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered February 15, 1916, upon findings in favor of the defendant mortgagee, in an action to foreclose a mortgage, tried to the court. Affirmed.

Daniel B. Trefethen, for appellant.

Burkey, O'Brien & Burkey, for respondent.

MOUNT, J.—This appeal is from a judgment in foreclosure. The appellant insists that the trial court erred in refusing an order directing more than one sale of the mort-

[1]Reported in 161 Pac. 833.

gaged property. The facts are not disputed, and are briefly stated as follows:

The defendant, National Realty Company, executed three mortgages upon two lots in the city of Tacoma. The first mortgage was in favor of The Metropolitan Life Insurance Company for the sum of $375,000; the second mortgage was in favor of the respondent, William Virges, in the sum of $20,000; and the third mortgage to the appellant, DuPont Powder Company, for $95,000. This action was brought by the DuPont Powder Company to foreclose its mortgage.

William Virges, and other parties whose liens were alleged to be subsequent in time to the plaintiff, were made parties to the action. Virges answered by cross-complaint, alleging that his mortgage was prior to that of the plaintiff, and prayed for foreclosure. The Metropolitan Life Insurance Company, holding the first mortgage, was not a party to the action. Upon a trial of the issues, the court found that the Virges mortgage was prior to the plaintiff's mortgage, and entered a decree finding the amount due upon the Virges mortgage, the amount due upon the plaintiff's mortgage, and directed a sale of the mortgaged property to satisfy these mortgages; that the proceeds of the sale should be applied, first, to the payment of the costs and expenses of the receivership; second, to the payment of the amount found due to the cross-complainant, William Virges; and third, the balance to be applied to the amount due to the plaintiff. The court refused to order the property sold, first, to satisfy the Virges judgment, and thereafter again sold upon the judgment in favor of the plaintiff. This appeal is from that order.

The appellant contends that there should have been successive sales of the property, in order that the right of redemption of the subsequent creditor might be enforced. It is not claimed by the appellant that there is a statute authorizing the trial court to order successive sales of property where there are successive mortgages. The statute, Rem. Code, § 1118, provides that, in rendering judgments, the court shall

order the mortgaged premises, or so much as may be necessary, sold to satisfy the mortgage and costs of the action. It is probably correct to say that, where successive mortgages are foreclosed in separate suits, separate sales may be made, but where different mortgages are foreclosed in one suit, it is clearly not necessary that the court should make an order of successive sales. The prior mortgage has a prior right, and must be satisfied before subsequent mortgages may participate in the fruits of the sale. It is unnecessary to determine at this time the rights of the redemptioners. If a statutory right of redemption exists in favor of subsequent lienors, where a sale has been had of the mortgaged property, then the parties may protect themselves by such redemption. The record in this case does not disclose that there has been any offer of redemption, and, of course, that question is not before us upon this appeal. The trial court, not being required by statute to order successive sales upon a judgment of foreclosure, does not commit error when it refuses to make such an order.

For that reason, the judgment must be affirmed.

MORRIS, C. J., HOLCOMB, PARKER, and FULLERTON, JJ., concur.

[No. 13652. Department Two. December 26, 1916.]

LEO MATSON, *Appellant*, v. PIERCE COUNTY, *Respondent*.[1]

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS—HIGHWAYS—NEGLIGENCE. In an action for injuries sustained by a traveler by team through obstructions in a county road, an instruction which, standing alone, seemed to require the plaintiff to show that he was free from contributory negligence, is not prejudicial error where it was merely a prefatory or explanatory statement and other instructions properly defined contributory negligence under the circumstances shown.

SAME. In an action for injuries sustained by a traveler by team, through hitting an obstruction at the side of the road after he had pulled out to the left on a hillside to allow an automobile to pass, it is not reversible error to give an instruction relating to the law of the road explanatory of his right to turn either to the right or left as the circumstances required, notwithstanding the law of the road was not applicable to the case, where appellant invited the error by making a request on that subject.

HIGHWAYS — OBSTRUCTIONS — PERSONAL INJURIES — NEGLIGENCE—EVIDENCE. Negligence in the maintenance of a county road is not shown by the fact that a log was left near the side of the road, which was in good condition and thirteen feet wide and reasonably safe for travel, and no accident would have happened except for the fact that plaintiff, carrying no lights, turned out of the roadway into the bank on a dark night.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered May 22, 1916, upon the verdict of a jury rendered in favor of the defendant, in an action for personal injuries sustained through an obstruction in a county road. Affirmed.

Bates, Peer & Peterson, for appellant.

Fred G. Remann, Harry E. Phelps, and *A. B. Bell*, for respondent.

MOUNT, J.—Action for personal injury.

On the night of November 7, 1914, at about 8:30 o'clock, appellant was driving a one-horse wagon down a hill on one

[1]Reported in 161 Pac. 846.

of the public county roads of Pierce county. The hill was long, and the road was cut into the side of the hill so that upon the left side the bank rose precipitously. On the right side, there was a declivity of thirty or forty feet down to a river. While the appellant was upon this road, he met an automobile coming up the hill. When the appellant, driving down the hill, saw the automobile coming up the hill toward him, he turned his horse to the left toward the bank above him, and stopped near the bank until the automobile passed. The night was dark, and appellant could only see enough to guide the horse in the road. When the appellant stopped his horse, he must have been up to, or very close to, a log, about twenty-seven inches in diameter, which leaned upon the bank with the lower end fixed in the ground at the side of the traveled way. After the automobile had passed, the appellant started his horse again down the hill, when the wheels of his wagon struck the log, and he was thrown out and injured. In his complaint, he alleged that the county was negligent in maintaining the road with the log upon the side of the bank in the position stated. The county, in answer to the complaint, denied the allegations of negligence, and pleaded contributory negligence. Upon these issues the case was tried to a jury, and a verdict was returned in favor of the defendant. Plaintiff has appealed from the judgment of dismissal entered upon the verdict of the jury, and alleges that the court erred in giving the following instruction:

"This action is based upon the alleged negligence of the county. If the county was guilty of negligence in its supervision or care of the road at the place where the accident occurred and that negligence was the cause of the accident, it is liable for the injury sustained by the plaintiff, if the plaintiff himself was free from negligence in using the road at the time of the injury. If the county was not negligent in its care of the road, it is not liable."

It is argued by the appellant that this instruction is erroneous; first, because it fails to state that appellant's negli-

gence, to defeat a recovery, must have contributed to his injury; second, that such negligence on his part must have been the proximate cause of the injury; and third, that it imposes a higher degree of care upon the appellant than the law requires. If this instruction stood alone, it would, no doubt, be insufficient, because it seems to require that the appellant himself should be *free from negligence;* but it is apparent from the reading of the instruction itself that it is merely a statement of the case, without an attempt to define either negligence or contributory negligence. It is a prefatory or explanatory statement. Further along in the instructions, the court defined what would constitute contributory negligence, and after stating to the jury what circumstances they might consider in order to determine whether the appellant was guilty of contributory negligence, said that the jury might consider:

". . . all of the circumstances and conditions surrounding the situation at the time, that should appeal to a man of ordinary prudence in deciding which was the reasonably safe and cautious thing to do, and if you find that in doing so he acted as a reasonably prudent person, mindful of his own safety, would have done under the same circumstances he is not guilty of contributory negligence in turning to the left.

"In determining whether the plaintiff could have avoided running over the end of the log by the exercise of the degree of care required of him at the time, you are to consider the length of time the plaintiff had personally known that the tree was there, and you are to take into consideration the number of times plaintiff had driven along the road, by the tree, and how familiar he was with the road, and that locality; and with the circumstances surrounding the case; and if from all the circumstances you are of the opinion that, by the use of ordinary care he could and would have avoided the tree, then you would be justified in finding that he was guilty of negligence contributing to the injury, and in such case the plaintiff cannot recover."

So it is clear that the instruction complained of was not the only one upon the degree of care required of the appellant.

It was merely explanatory. This court has held that, where such instructions, taken in connection with the remainder, constitute a fair exposition of the law of the case, they do not constitute error. *Wheeler v. North American Transp. & Trad. Co.*, 21 Wash. 704, 57 Pac. 1103.

We think, taking the instructions as a whole, the court properly instructed upon the question of negligence. At the trial of the case, the court gave the following instruction:

"It is the law of the road in this state that if any person driving any vehicle meet another on a public highway in this state, the person so meeting shall seasonably turn their vehicles to the right of the center of the road, so as to permit each vehicle to pass without interfering or interrupting the other.

"Seasonably turn means, that the travelers shall turn to the right in such season that neither shall be retarded in his progress by reason of the other occupying his half of the way, which the law has assigned to his use, when he may have occasion to use it in so passing. In short each has the undoubted right to one half of the way whenever he wishes to pass on it, and it is the duty of each, without delay, to yield such half to the other.

"But a person may lawfully use what is to him the left hand side of the road if there is no travel at that time upon that part of the way, or if the travel is not so heavy as to make his conduct a source of danger. But a person upon the wrong side of the way must always exercise a care commensurate with his position. This is usually a higher degree of care than that required of him while on the correct side of the way."

The court refused to give the following instruction requested by the appellant:

"The statute law of the road requiring the drivers of vehicles meeting on a public highway, to turn to the right, is intended for the safety and protection of such travelers themselves.

"In the present instance, this law would have governed the conduct of the plaintiff in his relation and duty to the automobile, and he would have been guilty of negligence had

he collided with the automobile by reason of his having turned to the left.

"However, so far as this defendant is concerned, plaintiff was entitled to the use of any portion, or either side of the highway which from the evidence you find the defendant may have improved, and which was reasonably necessary in meeting and passing vehicles at that point, and over which for that purpose, the defendant had extended an invitation to travel. And you are instructed that the fact that the plaintiff turned to the left instead of the right, was not of itself negligence on plaintiff's part, but was merely one of the elements or items of the incident, which together with all the other circumstances and conditions surrounding the situation you should take into consideration in determining whether or not plaintiff did as a reasonably prudent person would have done."

The giving of the first of these instructions, and the refusal of the second requested by the appellant, are assigned as error. The two are argued together in the brief, to the effect that the law of the road had no application to the case. It is probably correct to say that the law of the road did not control this case, because the law of the road is meant to control the conduct of vehicles meeting or passing each other upon the highway. It was apparently given by the court to explain the right of appellant to turn either to the left or to the right, controlled by the circumstances which confronted him at the time. The first instruction was, we think, a correct instruction, under the rule in *Segerstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876.

Conceding that the law of the road, as determined by statute, was not applicable to the case, we are satisfied that the giving of the instruction here complained of, and the refusal to give the one requested, were not prejudicial error, and we are of the opinion that if it was error to give the instruction upon the subject of the law of the road, it was invited error, by reason of the request of the plaintiff for an instruction upon that subject. Whether there was error in the instructions or not, we are satisfied that there could

be no recovery in any event. According to the appellant's own evidence, he was familiar with the road. The road was in good condition. It was thirteen feet wide at the point where this log lay upon the bank. The night was dark. The appellant did not carry a light. He drove out of the main traveled way to the side of the road as near to the bank as he could get. He stopped his horse until the automobile went by. He then started his horse, ran against this log, and was thrown to the ground.

In *Blankenship v. King County*, 68 Wash. 84, 122 Pac. 616, 40 L. R. A. (N. S.) 182, it was said:

"This court has heretofore held, and it is the general rule, that counties are not obligated to open highways to travel for their full located width; but that their duty in this regard is accomplished by opening the way for a sufficient width to make it reasonably safe and convenient for ordinary travel; that it is not compelled to keep the sides of the prepared way free from obstructions, nor is it obliged to erect barriers where there is no unusual danger to be encountered."

The only evidence of negligence on the part of the county, shown in this case, is that it permitted this log to lie upon the bank, with one end buried near the traveled roadway. It is not, and cannot be, claimed that the roadway was not of a sufficient width to make it reasonably safe and convenient for ordinary travel. It was reasonably safe for such travel, and but for the fact that the appellant turned out of the roadway into the bank, on a dark night, there could have been no injury. It is clearly not negligence for counties in this state to permit logs of the character of this one, lying as this one did, to remain at the side of the road. We are satisfied that there was no negligence on the part of the county sufficient to submit to the jury.

The judgment must, for this reason, if for no other, be affirmed.

MORRIS, C. J., FULLERTON, HOLCOMB, and PARKER, JJ., concur.

[No. 13268. Department One. December 29, 1916.]

J. H. MATTOCKS *et al.*, *Plaintiffs and Appellants*, v. GREAT NORTHERN RAILWAY COMPANY, *Defendant and Appellant*, P. GIBBONS *et al.*, *Defendants*.[1]

APPEAL—RECORD—STATEMENT OF FACTS—OFFICIAL STENOGRAPHER—STATUTES. Rem. Code, §§ 389 and 391, relating to the preparation by the appellant and the certification of a statement of facts on appeal, does not require the statement to be made up from the stenographic notes of the official court stenographer.

MINES AND MINING — CONTRACTS — GRUBSTAKE—PARTNERSHIP. A contract for prospecting and drilling for oil does not create a partnership, but shows, rather, a common venture in the nature of a "grubstake," in mining parlance, where the outfitter agreed to furnish drilling machinery and make advances for expenses, up to a certain limit, in consideration of which the prospector was to give a half interest in oil leases upon the discovery of oil in paying quantities.

SAME. In such a case, the nature of the contract is not changed by the fact that the operator had the right to obtain further advances from other parties in consideration of a proportional division of returns on the venture, after completion of the advances by the outfitter; and that would not create liability for obligations incurred by the prospector in the prosecution of the work.

JOINT ADVENTURES—CONTRACT. An arrangement in the nature of a grubstake whereby one party was to furnish drilling machinery and advances in consideration of a half interest in oil leases upon discovery of oil, is not a joint enterprise or undertaking to operate or develop joint property and divide proceeds, thereby creating a partnership; since there was no joint ownership of property.

PRINCIPAL AND AGENT — RELATION — AUTHORITY. A prospector's foreman in charge of oil drilling under a grubstake contract, with authority to hire men who, under the contract, were to be paid by the prospector, has no power to bind the outfitter by representations that the men were to look to the outfitter for their pay.

MECHANICS' LIENS—LABORER'S LIENS AGAINST LANDLORD — PROPERTY COVERED—REMOVABLE FIXTURES BELONGING TO ANOTHER. A portable drilling apparatus, a boiler built on its own carriage wheels, and a drilling machine fitted on a wagon bed with wheels, belonging to the outfitter under a grubstake contract, and not attached to the

[1]Reported in 162 Pac. 19.

soil, are not such fixtures as are coverable by liens of laborers against the leaseholds of the oil prospector employing the laborers, under the mechanics' lien laws; since the liens do not attach to property not belonging to the employer, although used by him in the work.

MECHANICS' LIENS — FORECLOSURE — DEFICIENCY JUDGMENT — PERSONS LIABLE. In an action to foreclose labor liens against the leaseholds of an oil prospector, for work done under a grubstake contract, the outfitter who furnished portable machinery for the use of the prospector cannot be made personally liable for either costs or attorney's fees, where it had no property to which the liens could attach and was not personally obligated to pay for the services.

Cross-appeals from a judgment of the superior court for Skagit county, Pemberton, J., entered July 14, 1915, upon findings in favor of the plaintiffs, in an action to foreclose mechanics' liens. Reversed on defendant's appeal.

A. R. Hilen and *Coleman & Gable*, for plaintiffs and appellants.

F. V. Brown and *F. G. Dorety*, for defendant and appellant.

FULLERTON, J. — On August 15, 1912, the defendant P. Gibbons entered into a verbal agreement with the Great Northern Railway Company by the terms of which he agreed to procure oil leases on certain lands in Skagit county and sink a well, at some place thereon to be selected by himself, for the purpose of exploring for oil, the railway company agreeing to furnish the machinery and other equipment necessary for driving the well and to furnish $600 in money to be expended for labor in the prosecution of the work. In consideration therefor, the railway company was to have an assignment from Gibbons of a one-half interest in the leases in case oil should be discovered on any part of the lands. In October, 1912, certain well drilling machinery owned by the railway company and then situated in North Dakota was shipped to Skagit county and placed in charge of Gibbons for operating purposes. Drilling began December 1, 1912, and continued under this oral agreement until February 25,

1913, when P. Gibbons and wife, as parties of the first part, entered into a written contract with the railway company, as party of the second part, which contract contained the following provisions:

"Whereas, party of the second part has already advanced to first party the sum of eight hundred eighty 75-100 dollars, and has furnished the use of a drill, all for the purpose of exploring for oil upon some of the lands above referred to, and said second party has agreed, and does hereby agree, to advance to first party the further sum of six hundred nineteen no-100 dollars, and to permit further use of said drill by first party until said sum to be advanced as aforesaid shall have been expended in the prosecution of said oil explorations;

"Now, Therefore, in consideration of the foregoing premises, party of the first part covenants and agrees with party of the second part as follows:

"(1) That said party of the first part will prosecute the work of exploring for oil upon some of the lands above referred to, and will employ all necessary labor and furnish all necessary materials in such manner and in such places as he shall deem most expedient, until he has expended in an efficient and economical manner, in the prosecution of said work, at least the sums advanced and to be advanced by party of the second part as aforesaid. Said labor and materials to be procured, and said work to be prosecuted upon the sole responsibility of party of the first part, and party of the second part to have no interest in, nor direction of, said work, except as hereinafter stated, and to incur no obligation, except as above stated, and party of the first part agrees to exonerate and save harmless party of the second part from any further obligations or expenses in connection with said operations.

"(2) Party of the first part further agrees that in case any oil, gas or other minerals shall be discovered in paying quantities in any of the properties covered by any of said leases procured or to be procured by party of the first part as aforesaid, he will thereupon and thereafter hold all of the leases above referred to, procured or to be procured as aforesaid, in trust for the joint use and benefit of himself and party of the second part, and will upon demand by party of the second part, assign to party of the second part, its suc-

cessors or assigns, an undivided one-half of all of the interest of party of the first part in and to any and all of said leases, and that party of the second part shall be entitled to one-half of the interest of party of the first part in any deposits of gas, oil or other minerals discovered in any of said properties.

"(3) The agreement of party of the second part to furnish the use of a drill as above provided shall be construed to include all necessary pipes and equipment to be used in connection with said drill, and it is understood that after party of the first part shall have expended the total sum of fourteen hundred ninety-nine and seventy-five one-hundredths ($1,499.75) dollars, advanced and to be advanced by party of the second part, as aforesaid, he shall be under no further obligation to prosecute the work of exploration or development at his own expense, but that if he should voluntarily choose to incur further obligations in said work the same shall be discharged by himself and not by party of the second part. The advancing of any further sums by party of the second part shall be at the option of party of the second part, and if advanced by party of the second part, shall be expended by party of the first part under the terms of this agreement.

"(4) In case the sums advanced as herein provided for, and any additional sums which party of the second part shall choose to advance for said work, shall have been expended without striking gas, oil or other minerals in paying quantities, and in case party of the second part shall decide not to advance any further sums to carry on said work, party of the first part shall have the right to advance further sums himself or to secure the advancement of further sums from other parties and to proceed with the expenditure of such further sums in the said work of exploration, and if thereafter oil, gas or other minerals shall be discovered in paying quantities, the rights and interests hereinabove created and provided for in favor of party of the second part shall be divided between party of the second part, its successors and assigns, and the party or parties advancing such further sums in proportion to the amounts theretofore advanced by party of the second part, and such other party or parties respectively and actually expended in said work of exploration and development."

The railway company had nothing to do with the hiring of any of the men employed upon the work, but during the time the work was continued and prior to May 1, 1913, it advanced all the money agreed to be advanced in the contract and nearly $1,300 additional, making a total advancement of $2,769.14. This sum covered all the operating expenses until May 1, 1913. At this time the Great Northern Railway Company notified Gibbons that it would make no further advancements, and advised Gibbons that, if he intended to work further, he must seek advances from other parties. Gibbons accordingly interested in the enterprise some Seattle parties, who made advancement between that time and December 1, 1913, in sums aggregating some $2,800 or $2,900. At this time the Seattle parties refused to advance further funds, and notified Gibbons to that effect. Gibbons, notwithstanding, continued the work until about the end of April, 1914. At the latter date, certain of the employees, including the plaintiffs in this action, had not been paid in full and, to secure payment, they filed liens upon the leasehold interests then standing in the name of Gibbons and on the well drilling outfit of the Great Northern Railway Company. On August 5, 1914, they began an action to foreclose the liens, filing a final amended complaint on December 2, 1914. In this complaint it was sought to hold the railway company personally liable on amounts due the plaintiffs which should not be paid by the sale of the property on which the liens were filed. The railway company took issue on the complaint and a trial was had, at the conclusion of which the court decreed the liens to be valid upon all of the property described therein and entered a decree foreclosing the liens, decreeing further that the plaintiffs have a personal judgment against P. Gibbons and wife for any deficiency that might remain after the sale of such property, and a personal judgment against the Great Northern Railway Company for attorney's fees and the costs of suit. From this decree, the plaintiffs appeal, assigning error on the refusal of the court to render a deficiency judg-

ment against the Great Northern Railway Company for the amount due the plaintiffs after the sale of the property beyond the costs and attorney's fees. The Great Northern Railway Company appeals from that part of the decree allowing the plaintiffs costs and attorney's fees against it and allowing a lien upon the drilling machinery used in drilling the prospecting well.

The Great Northern Railway Company, being the first appellant, prepared a statement of facts, serving it upon the plaintiffs, which the court afterwards certified. As a preliminary question, the plaintiffs moved to strike this statement, basing their motion on the ground that the evidence in the case had been taken by a stenographer other than the official court stenographer appointed for Skagit county. They urge that, since the legislature had provided for an official reporter, to be appointed after test of his ability and qualification and on his filing an oath and furnishing a bond, no statement of facts can be prepared other than by such official reporter; and since the evidence in the present case was taken by a stenographer employed by one of the parties and the statement of facts was compiled from his notes, it is not properly in the record.

The motion to strike is without merit. Under the code (Rem., § 389) it is provided that a party desiring to have a bill of exceptions or statement of facts certified must prepare the same as proposed by him, file it in the cause, and serve a copy thereof on the adverse party; that, within ten days after such service, any other party may file and serve on the opposing party any amendments which he proposes to the bill or statement; that either party may then serve upon the other a written notice that he will apply to the judge of the court before whom the cause is pending or was tried, at a time and place specified therein, to settle and certify the bill or statement. By § 391 it is provided that the judge shall settle the statement if the parties disagree as to the contents thereof, and shall certify that the statement embodies matters

and proceedings occurring in the cause and that the same are thereby made a part of the record, and, when such is the fact, shall further certify that the same contains all the material facts, matters and proceedings theretofore occurring in the cause and not already a part of the record therein. There is nothing in either this statute or the statute to which the plaintiffs refer which requires that the statement shall be made up from the notes of the official court reporter, or from notes of a reporter at all. Indeed, the appellant may make up the statement from his own notes or from any source and may have it certified, so long as it correctly states the testimony given at the trial of the cause. The notes of the official stenographer may furnish a convenient reference as to what the actual testimony was should the parties disagree, but such are nowhere made the only permissible official record, and the statute relied upon clearly does not repeal the statutes we have cited which provide the method of settling statements of facts. The motion is denied.

On the merits, the plaintiffs contend for a personal judgment against the defendant railway company, on the theory that a partnership existed between that defendant and P. Gibbons, and that, since the railway company never gave notice of the dissolution of the partnership, it is liable for any indebtedness contracted by Gibbons with parties who extended credit or furnished labor and materials to Gibbons on the belief in the existence of that relation. But we think that the plaintiffs are in error in their assumption that a partnership did exist between Gibbons and the railway company. The contract seems to us to show that the parties engaged in a common venture in the nature of that which in mining parlance is called a grubstake, whereby one of the parties undertakes to prospect for mineral and agrees to yield to the other, who furnishes money or supplies for the enterprise, a certain proportionate interest in any minerals discovered. It is true that the contract provides that, on the refusal of the railway company to advance further funds,

Gibbons shall have the right to advance further sums himself, or to secure the advancement of further sums from other parties and to proceed with the expenditure of such further sums in the prosecution of the work, and that, in case of discovery of oil, gas, or other minerals in paying quantities, the half interest in the lands created in favor of the railway company by the agreement shall be proportionately divided between the railway company and any new parties advancing funds for the exploration; but this does not change the nature of the contract from a grubstake contract to a mining partnership. By it the railway company simply sought to secure such interests as it might be entitled to because of the funds it should choose to advance. In other words, its rights should be fixed at the time it ceased to advance funds. But the clause did not render it liable for any obligations incurred by Gibbons in the prosecution of the work.

The plaintiffs argue further that the enterprise was a joint undertaking by two or more parties to operate or develop their joint property with an agreement to divide the proceeds, and that, by operation of law, this constitutes a partnership. If this were a correct interpretation of the agreement, the conclusion would perhaps follow, but we cannot accept it as a correct interpretation. There was no joint ownership of property or joint enterprise in the sense of two or more persons working property jointly owned by them. No oil well was in existence at the time the contract was entered into. The contract was, in its essence, nothing more nor less than an agreement whereby one person agreed to search for oil and the other agreed to furnish him with certain moneys and supplies in the prosecution of the search. None of the cases hold such a contract to be a partnership.

An illustrative case on the principle involved is *Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689, where it was held that an agreement whereby one advanced money to another to enable that other to go to Alaska and prospect, one-half of the mines or claims located and of minerals extracted to go to

the party making advances, did not constitute a mining partnership, but one only for a moiety of the property acquired. In *Hartney v. Gosling*, 10 Wyo. 346, 68 Pac. 1118, 98 Am. St. 1005, the contract was one where certain parties advanced $700 to one Young to enable him to prospect in Alaska for gold, and agreed to pay a monthly sum to his family for support during his absence, the parties advancing the money to have a specified interest in any mines discovered. While engaged in prospecting, Young located a claim and sank two shafts, but abandoned it as worthless. Later he found it necessary to borrow $500 to buy provisions, and the lender sought to hold the persons interested with Young, on the theory that the loan was to a mining partnership. The court held that the contract was merely a prospecting or grubstaking contract, and that no liability existed. In the course of the opinion, the court said:

"The agreement in this case definitely fixed the amount of money to be furnished to the prospector. The parties did not contract to supply him indefinitely with provisions and supplies. . . . It is evident that, by virtue alone of the agreement, he could have had no legal recourse upon them for more money to pay his personal expenses. We are unable to see how the contract can be extended by judicial construction to cover additional liability on the part of those furnishing the money portion of the capital for the common enterprise. To do so would, in effect, be equivalent to holding that when one has merely agreed to provide and does provide a definite sum of money to another, to use in prospecting for mineral, by that act alone he becomes bound for all expenses incurred by that other for personal supplies after, or even before, the sum originally furnished has been exhausted. We do not think that is the law. We have not been cited to any case announcing such a doctrine, and we are aware of no principle in the law that would authorize it."

This decision, we think, aptly fits the facts in the present case. The contracts in both instances are what may well be called grubstaking contracts. Such a contract is, in its usual scope, simply a common venture wherein one party, called

the outfitter, supplies the provisions and the other party, called the prospector, performs the labor, and all discoveries inure to the benefit of both parties in the proportion fixed by the agreement. 2 Lindley, Mines, § 858.

The evidence sufficiently shows that Maddocks, whom Gibbons placed in charge of the drill and who hired all the workmen, was conversant with the exact situation between Gibbons and the Great Northern Railway Company. If he told the lien claimants, as some of them testified, that they were to look to the Great Northern Railway Company for their money, it was an assertion without basis and one beyond his authority to make. We are clear, therefore, that the court did not err in refusing to hold the Great Northern Railway Company personally for the work and labor performed.

The Great Northern Railway Company on its appeal contends that the court erred in awarding a lien on its drilling apparatus employed in sinking the well. The property sought to be held is described in the record in the following manner:

"One Star Machine, No. 26 Shop 2410, complete in all respect, together with derrick, engine, boiler, and all tools and all miscellaneous tools used in connection therewith:

920 feet 10-inch Clingo Special Pipe;
400 feet 12½-inch Clingo Special Pipe;
1 8-inch Swedge;
2 sets extra jars;
300 feet 6-inch line pipe or casing;
100 feet 8-inch line pipe or casing;
300 feet 3-inch line pipe or casing;
2,100 feet ⅞-inch Hercules line or cable;
2,000 feet ½-inch Hercules line or cable;
750 feet casing cable;
1 set triple blocks."

The evidence shows that the Star machine constituting the drilling apparatus mentioned in the description is a portable one not affixed to the leasehold in any manner. The boiler was built on its own carriage wheels and was not removed

therefrom or attached to the soil in any way. The drilling machine was fitted on a wagon bed with wheels, the whole appliance being portable and for temporary use only. Clearly these were not such fixtures as attached to the soil and as are coverable by a lien upon the leasehold interest Gibbons had in the real property. The liens asserted in the present case against Gibbons could not attach to any personal property not owned by him although used in his drilling operations. The object of the mechanics' lien laws is to give the laborer or materialman, in addition to a personal right of action, a lien against any property owned by his employer and which was used in the work upon which he was engaged. In no case do such laws recognize the right to subject property of another to the lien when such property is not owned by the employer, although it may have been used in the work in which he was engaged. It follows that the claimants have no right of lien against any of the property herein described excepting the casing inserted in the well and which may properly be said to be a part of the realty.

Nor do we think the plaintiffs were entitled to a personal judgment against the Great Northern Railway Company for costs and attorney's fees. As we construe the contract, the Great Northern Railway Company had no property upon which the liens filed could attach, nor was it personally obligated to them in any way for the payment of their services. One or the other of these conditions must exist before there could be any recovery against the railway company, and since there was no right of recovery, there could be no obligation to pay either costs or attorney's fees.

The decree will be reversed, with directions to enforce it against the interests in the property of Gibbons and wife only, and for a judgment against them for any deficiency remaining after the sale of such property.

MORRIS, C. J., CHADWICK, MOUNT, and ELLIS, JJ., concur.

[No. 13325. Department Two. December 29, 1916.]

TITLE GUARANTY & SURETY COMPANY, *Appellant*, v. FIRST NATIONAL BANK OF HOQUIAM *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS—PUBLIC WORKS — CONTRACTOR'S BOND—LOANS TO CONTRACTOR—LIABILITY. A surety on a contractor's bond given to secure labor and material claims is not liable to a bank financing the work by loaning money to the contractor, unless it is shown that the money loaned was used in the payment of labor, material, or supplies consumed in the construction of the work.

SAME—ADVANCES TO CONTRACTOR—PREFERRED CLAIMS—RIGHTS OF SURETY. A contractor having, before default, assigned to a bank the sums to grow due on a city contract as collateral security for advances, sums due the contractor to the extent of the eighty-five per cent due as the work progresses are to be first applied to the repayment of the advances, making the bank a preferred claimant to that extent; but the bank has no right to participate in the fifteen per cent reserve, withheld by the city for the protection of laborers and materialmen, as against creditors or the contractor's surety completing the work and discharging claims.

MUNICIPAL CORPORATIONS — STREET IMPROVEMENT — CONTRACTS — BOND OF CONTRACTOR—LIABILITY—SUPPLIES. A bond given by a contractor to secure payment of laborers and materialmen upon public work and all persons who shall furnish the contractor with "provisions and supplies" for the carrying on of said work, in compliance with Rem. & Bal. Code, § 1159, covers sums due for the rental of a donkey engine furnished to the contractor on city street improvement work.

PLEADING—ANSWER—DENIAL. A denial on information and belief of the filing with the city clerk of a claim against a contractor's bond to secure laborers and materialmen is insufficient to present an issue.

Appeal from a judgment of the superior court for Grays Harbor county, Irwin, J., entered September 16, 1915, upon findings in favor of the defendants, in an action to establish claims against a contractor's bond, tried to the court. Reversed as to one defendant; affirmed as to the others.

[1]Reported in 162 Pac. 23.

James B. Murphy and *Carl Kincaid*, for appellant.

C. W. Hodgdon, for respondent First National Bank of Hoquiam.

Morgan & Brewer, for respondent Foster Company.

Stewart & Tucker, for respondent Willamette Iron & Steel Works.

MAIN, J.—This action was brought by the plaintiff, as surety upon a contractor's bond, for the purpose of having the claims against the bond, for which the bonding company was legally liable, established in one action, and thus avoid a multiplicity of suits. After the issues were framed, the cause, in due time, was tried to the court without a jury, and resulted in a judgment establishing a number of claims against the bond. The claim of the First National Bank of Hoquiam was allowed in the sum of $1,500; that of F. G. Foster & Company, a corporation, in the sum of $442.75; and that of the Willamette Iron & Steel Works, a corporation, in the sum of $375. From that portion of the judgment which establishes these claims, the appeal is prosecuted. There is here no controversy over the validity of any of the other claims for which judgment was rendered against the bonding company.

The facts are these: On August 19, 1913, the city of Aberdeen contracted with Peter Hunley and Ralph Henry, copartners doing business under the firm name of Hunley & Henry, for the construction of a reservoir. The appellant, Title Guaranty & Surety Company, became surety upon a bond guaranteeing the performance of this contract. Soon after this contract was made, the contractors secured a contract for the construction of a bridge across the Cowlitz river, in Lewis county. The First National Bank of Hoquiam agreed with the contractors to finance the reservoir job, but declined to finance the Cowlitz river bridge job. As security for the money advanced by the bank, the contractors assigned

to it the warrants that they were to receive from the city from time to time.

When the reservoir contract was nearly completed, the contractors ceased work, and the bonding company completed the contract. When the contract was completed, there was a balance due from the city of $2,226.04. The bank claims that, while the contractors were engaged upon the work, they borrowed various sums of money from time to time, aggregating a total of $16,768.86, and that it has received in warrants, which have been applied to the indebtedness, $11,272.04. The bank claimed a balance due of $1,900, and the claim was allowed to the extent of $1,500, as above stated. While the Cowlitz river bridge was being constructed, checks were drawn upon the account for that job to the extent of approximately $5,000. These checks were paid by the bank without knowledge of the diversion of the funds.

The claim of the bank will first be considered. The trial court found that there was a balance due the bank in the sum of $1,500. The evidence fails to show for what the money furnished by the bank was expended. In other words, it does not show whether it was used for the payment of material, labor, or supplies, or whether it went to pay for those things which were a part of the contractors' equipment. It may be assumed that if the evidence had shown that the money was used for the purpose of paying for material, labor, or supplies, under the holding in *Puget Sound State Bank v. Gallucci*, 82 Wash. 445, 144 Pac. 698, Ann. Cas. 1916A 767, the bank had the right to have its claim established by judgment. Much reliance is placed upon that case by the bank. It was there held that the bank could recover against the surety company for so much of the money loaned to the contractor as could be traced into payments made for labor actually performed upon, and material actually furnished and consumed, in the construction of the improvement. That case was decided upon the broad provisions of the contract there guaranteed by the surety com-

pany. In the absence of a showing by the bank, in this case, that the money which it loaned to the contractors was used in the payment of labor, material, or supplies consumed in the construction of the work, the *Gallucci* case is not applicable, and no recovery can be had under the doctrine of that case.

It remains to inquire what the rights of the bank are under the assignment which it held from the contractors. The contract with the city for the doing of the work provided that, on or before the 10th day of each month, eighty-five per cent of the amount earned under the contract during the preceding month should be paid, and the balance, or fifteen per cent, was to be retained by the city until the completion and acceptance of the work. The amount earned under the contract was $13,498.08. The amount received by the bank, by virtue of the assignment, was $11,272.04. The balance, $2,226.04, was directed to be paid into the registry of the court. The bank, under its assignment, was a preferred claimant to the extent of the balance of the eighty-five per cent fund—the assignment having taken place prior to the default—but had no right to participate in the fifteen per cent by virtue of the assignment, which was to be retained until the work was completed and accepted. The previous decisions of this court upon this question have been reviewed, distinguished, and fully discussed in the recent case of *Northwestern Nat. Bank of Bellingham v. Guardian Casualty & Guaranty Co.*, 93 Wash. 635, 161 Pac. 473, and it is unnecessary to here further discuss the question. Fifteen per cent of $13,498.08, the amount earned under the contract, would be $2,024.71. The amount retained by the city, and which was directed by the court to be paid into the registry thereof, was $2,226.04. The difference between these two sums, or $201.33, would be the amount which the bank was entitled to, this being the portion of the eighty-five per cent fund which was included in the amount paid by the city into the registry of the court.

As to the claim of the Willamette Iron & Steel Works, the only question is whether the rental agreed to be paid by the contractors for the use of a donkey engine, in connection with the performance of the contract, is a claim which may be established against the bond. In the cases of *Hurley-Mason Co. v. American Bonding Co.*, 79 Wash. 564, 140 Pac. 575, and *National Lumber & Box Co. v. Title Guaranty & Surety Co.*, 85 Wash. 660, 149 Pac. 16, it was distinctly held that the rental value of machinery, hired by the contractor for use in carrying on work within the terms of the contract, is recoverable from the bondsman as a supply furnished the contractor. The force of these decisions is recognized by appellant, but comfort is sought to be derived from *United States Rubber Co. v. American Bonding Co.*, 86 Wash. 180, 149 Pac. 706, L. R. A. 1915F 951. In that case, the *Hurley-Mason Co.* and the *National Lumber & Box Co.* cases are referred to, and in no sense overruled. There is nothing in the opinion that would justify the conclusion that it was there intended to modify the doctrine announced in those cases.

As to the claim of F. G. Foster & Company, it appears that, upon the trial, the notice of the claim filed with the clerk was not introduced in evidence, and for this reason the judgment on this item is objected to. The failure to put the claim in evidence is fatal to a recovery, unless under the pleadings it became unnecessary to introduce the claim. The complaint filed by the appellant recites that F. G. Foster & Company, together with others, naming them, have each filed with the city clerk "some writing, by which they attempt to assert a claim against the said bond in the hands of the city treasurer, or against the above-entitled plaintiff, as surety upon said bond." It is further recited that the appellant does not know and is not able to determine whether any of the defendants mentioned in the action, asserting claims against the bond, have a valid claim, and asks that each of the claimants be required to set forth such claims as they have, and, if found meritorious, the amount of each claim

may be determined in one action. F. G. Foster & Company responded to the complaint by answer and cross-complaint. Paragraph seven of the cross-complaint alleges the filing of the claim in the office of the city clerk on December 10, 1914, and sets out a copy of the claim. Answering this cross-complaint, the appellant denies paragraph seven upon information and belief. The question here is whether this was a sufficient denial.

The claim, after it was filed, became a public document. The rule is that the denial of a public record or a public document upon information and belief is insufficient to present an issue. *Sumpter v. Burnham*, 51 Wash. 599, 99 Pac. 752; *Belknap Glass Co. v. Brown*, 69 Wash. 127, 124 Pac. 390; *White v. Jansen*, 81 Wash. 485, 142 Pac. 1140. The holding in those cases is hardly in harmony with the rule of *Cowie v. Ahrenstedt*, 1 Wash. 416, 25 Pac. 458. This earlier case, though not mentioned in any of the three cases cited, is, nevertheless, modified by the holding in those cases to the extent that it is inconsistent therewith. The denial in the present case would not be sufficient even under the rule stated in the *Cowie* case.

As to the First National Bank of Hoquiam, the cause will be remanded with direction to the superior court to enter a judgment for $201.33, payable out of the fund in the registry of the court. As to F. G. Foster & Company, and the Willamette Iron & Steel Works, the judgment will be affirmed.

MORRIS, C. J., ELLIS, CHADWICK, and FULLERTON, JJ., concur.

[No. 13469. Department One. December 29, 1916.]

STILWELL BROTHERS, INCORPORATED, *Respondent*, v. UNION MACHINERY & SUPPLY COMPANY, *Appellant*.[1]

ACTIONS—JOINDER—CONTRACT AND TORT—ARISING OUT OF SAME TRANSACTION. Causes of action for the rental due on a leased pump, and for recovery of possession of the pump under the claim and delivery statutes, may be united in the same action, under Rem. Code, § 296, providing for the joinder of several causes of action when they arise out of the same transaction.

COSTS—ITEMS RECOVERABLE—PREMIUM ON BOND. A premium paid on a replevin bond furnished by plaintiff is recoverable as "costs and disbursements" in the action, under Rem. Code, § 6059-194, providing that in all actions the party entitled to recover costs may include such reasonable sum as may have been paid a surety company for executing or guaranteeing any bond, as may be allowed by the court.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 26, 1915, upon findings in favor of the plaintiff, in an action of replevin, tried to the court. Affirmed.

Robert A. Eaton, for appellant.

Beeler & Sullivan, for respondent.

CHADWICK, J.—Respondent leased a pump to appellant upon a rental charge of $25 per month, with an option to purchase. The agreed rental was paid for four months. Upon default, respondent brought this action under the claim and delivery statute to recover its property and the accumulated rent.

Appellant demurred to the complaint upon the ground that two causes of action, one in contract and the other sounding in tort, had been improperly joined, relying upon: *Willey v. Nichols*, 18 Wash. 528, 52 Pac. 237; *Clark v. Great Northern R. Co.*, 31 Wash. 658, 72 Pac. 477; *Sanders v. Stimson Mill Co.*, 34 Wash. 357, 75 Pac. 974. These cases, while sus-

[1]Reported in 161 Pac. 1048.

taining appellant's contention, have been overcome by the act of 1907, amending § 4942 of Ballinger's Code; Rem. Code, § 296, providing that several causes of action may be united when they arise out of the same transaction. Since the passage of the amendatory act, the court has had occasion to hold contrary to the contention of appellant in: *Harding v. Ostrander R. & Timber Co.*, 64 Wash. 224, 116 Pac. 635; *Littlefield v. Bowen*, 90 Wash. 286, 155 Pac. 1053. The action for rent due and for the recovery of the pump arise out of the same transaction, and the demurrer was properly overruled.

Respondent submitted, as an item of costs in the court below, a charge of $10 paid to a surety company as compensation for the replevin bond furnished by it. It is complained that this is an improper charge. There has been some difference of opinion among the courts whether an item of this kind was within the legal meaning of the words "costs and disbursements," but we think there can be no question under our present statute, Rem. Code, § 6059-194, which was given an interpretation in *Church v. Wilkeson-Tripp Co.*, 58 Wash. 262, 108 Pac. 596, 109 Pac. 113, 137 Am. St. 1059. It was there held that a premium on an appeal bond was a proper item to be taxed as costs, and that a proper construction of the statute mentioned required that we give meaning to the words:

". . . in all actions and proceedings, the party entitled to recover costs may include therein such reasonable sum as may have been paid such company for executing or guaranteeing any such bond or undertaking therein as may be allowed by the court or judge before whom the action or proceeding is pending."

thereby making a special provision for actions and proceedings and holding specifically that the statute was not limited, as there contended, to the recovery of premiums paid by receivers and others acting in a fiduciary relation.

We find in the record a motion to strike the statement of facts. No errors are assigned which require an examination of the testimony. It is therefore unnecessary for us to pass upon the motion.

We find no error. The judgment is affirmed.

MORRIS, C. J., HOLCOMB, and ELLIS, JJ., concur.

[No. 13501. Department One. December 29, 1916.]

T. S. HILLS *et al.*, *Appellants*, v. THE CITY OF HOQUIAM, *Respondent*.[1]

LIMITATION OF ACTIONS—RUNNING ACCOUNT—ACCRUAL OF ACTION. Where goods were furnished to a city at irregular intervals during a term of years upon separate orders, and no demand made or moneys paid until after the furnishing of the last item, there were no mutual demands and no mutual account that would prevent the running of the statute of limitations as to the earlier items, and the cause is barred as to all goods not furnished within three years prior to the commencement of the action under Rem. Code, § 159.

Appeal from a judgment of the superior court for Grays Harbor county, Sheeks, J., entered October 15, 1915, upon findings in favor of the defendant, in an action on an account, tried to the court. Affirmed.

James P. H. Callahan, for appellants.

Sidney Moor Heath, for respondent.

PARKER, J.—The plaintiffs, as assignees of Powell & Ross, copartners, commenced this action in the superior court seeking recovery from the city of Hoquiam of the sum of $232.95, the alleged purchase price of goods furnished to the city by Powell & Ross during the nearly six-year period between March 9, 1908, and December 29, 1913. Trial before the court without a jury resulted in findings and judgment in favor of the plaintiffs for the sum of $35 only, being the value

[1]Reported in 161 Pac. 1049.

of goods furnished by Powell & Ross to the city within three years prior to the commencement of the action. From this disposition of the case, the plaintiffs have appealed to this court.

It is contended in appellants' behalf that the trial court erred in holding that their right to recover for the goods furnished to the city prior to three years before the commencement of the action is barred by the three-year statute of limitations, Rem. Code, § 159, this being the city's principal defense.

The facts determinative of the rights of the parties, in so far as the question of the statute of limitations is concerned, may be summarized as follows: During the period of the furnishing of the goods as claimed, Powell & Ross were engaged in the grocery business in the city of Hoquiam. On March 9, 1908, they furnished to the city the first bill of goods, amounting to ninety cents, and on December 29, 1913, they furnished to the city the last bill of goods, amounting to twenty-five cents. Between these dates at somewhat irregular intervals they furnished to the city over two hundred bills of goods, none of which exceeded $7 in amount, the whole totaling $232.95. The goods were all charged against the city upon the books of Powell & Ross as they were furnished, in one account. There is nothing in the record, however, to indicate that the city knew in what manner the goods were charged upon the books of Powell & Ross, or that they claimed the purchase price thereof as one cause of action, until the commencement of this action. It seems plain that no two or more bills of goods were furnished in pursuance of any one contract, express or implied. That is, no one bill had any connection with any other bill, other than by the fact that they were charged by Powell & Ross on their books in one account against the city. The goods consisted of brooms, brushes, mops, soap, gold dust, matches, lanterns, oil, etc., evidently being only such minor articles as were used by the city in the caring for its buildings and bridges.

It is so indicated in the bill of particulars. No demand was ever made, by the rendering of any bill or statement of any nature, for payment of any part of the purchase price of the goods so furnished until in April, 1914, over three months after the furnishing of the last bill of goods. All of the goods were furnished more than three years before the commencement of this action, except goods of the value of $35, for which judgment was awarded appellants as above noticed.

The theory of appellants' claimed right of recovery and avoidance of the effect of the statute of limitations invoked by the city is best shown by the following statement in their counsel's brief:

"Appellants' contention is that there was an open and outstanding account between the parties and as such comprises one transaction until the same shall have been closed by one or the other of the parties. Such an account may run over a period of time so long as there is expectations of future transactions, and the statute of limitations will not begin to run until such account has been closed by one or the other of the parties, which, in this case, would be December 29, 1913."

Counsel relies upon the rule which, as he claims, and we assume for argument's sake, would require appellants to sue for the recovery of the whole of the claimed indebtedness in one cause of action, or, in any event, prevent them from seeking recovery in different suits. We do not think that, solely because appellants may have been so compelled to sue, it follows that the statute of limitations is not a good defense to that part of the indebtedness accruing more than three years before the commencement of this action.

The rule and the reason therefor invoked by counsel for appellants is well stated in the early case of *Guernsey v. Carver*, 8 Wend. 492, 24 Am. Dec. 60, where there was involved an effort to recover by separate suits upon separate items of an account covering a considerable period of time. The case appears not to have been disposed of upon the

theory of the account being a mutual one. Judge Nelson, speaking for the court, said:

"The whole account being due when the first suit was brought, it should be viewed in the light of an entire demand, incapable of division, for the purpose of prosecution. The law abhors a multiplicity of suits. According to the doctrine of the court below, a suit might be sustained (after the whole became due) on each separate item delivered, and if any division of the account is allowable, it must no doubt be carried to that extent. Such a doctrine would encourage intolerable oppression upon debtors, and be a just reproach upon the law. The only just and safe rule is to compel the plaintiff on an account like the present to include the whole of it due in a single suit."

In *Williams-Abbott Elec. Co. v. Model Elec. Co.*, 134 Iowa 665, 112 N. W. 181, 13 L. R. A. (N. S.) 529, Chief Justice Weaver, speaking for the court following citation of the *Guernsey* case and other authorities, said:

"These authorities uphold the contention that an account consisting of one or more items, all of which are due and payable, constitutes but one demand; and, if the party to whom the same is due sees fit to bring suit for a part thereof, and recovers judgment, such recovery will be a bar to further suit upon the remainder of the claim."

It seems to us that these observations of the learned writers of those decisions show that the rule is rested upon the rule of public policy which avoids multiplicity of suits so far as possible, rather than upon any strict or technical definition of what is a single cause of action. Other authorities called to our attention by counsel for appellants touching directly the question of limitation of actions relate to mutual accounts upon which the balance due from one of the parties to the other constitutes the cause of action, rather than the several items from which such balance results. These authorities seem to be relied upon on the theory that this is in substance a mutual account. This account, as we have seen, does not consist of mutual debits and credits, there being no charge

by the city against appellants' assignors, not even in the form of a single payment upon the alleged indebtedness. A mutual account within the meaning of Rem. Code, § 166, the balance of which constitutes a single cause of action upon which the statute runs from the furnishing of the last item, is one "where there have been reciprocal demands between the parties." Manifestly this is no such account preventing the running of the statute until the furnishing of the last item. *Garey v. Pasco*, 89 Wash. 382, 154 Pac. 433; *Bank of Blakely v. Buchannon*, 13 Ga. App. 793, 80 S. E. 42; 1 R. C. L. 205; 1 C. J. 598.

It seems clear to us that the judgment must be affirmed. It is so ordered.

MORRIS, C. J., MAIN, CHADWICK, and ELLIS, JJ., concur.

[No. 13520. Department One. December 29, 1916.]

UNITED IRON WORKS, *Appellant*, v. RATHSKELLER COMPANY, *Respondent*.[1]

ACCOUNT STATED—RENDITION OF BILL—ASSENT — SILENCE. Mere silence upon receiving a bill and repeated demands for payment does not of itself constitute an implied agreement as to any sum due as upon an account stated.

SALES—WARRANTIES—BREACH. Where plaintiff installed a compressor in defendant's refrigerating plant, under express warranties, and upon its proving so defective in operation that the defects could not be remedied, plaintiff furnished a new compressor to take its place, plaintiff did no more than the warranties required, and therefore had no right of action on *quantum meruit* for the value of the new one.

SAME—WARRANTIES—BREACH—WAIVER—USE OF ARTICLE. The use for some time of a compressor installed in a refrigerating plant under express warranties, does not waive breach of the warranties, where the defects were hidden and not readily discoverable, the seller continued promises and efforts to cure the defects until a new one was furnished, and from time to time gave assurances that the defect was not serious.

[1]Reported in 161 Pac. 1197.

Appeal from a judgment of the superior court for King county, Smith, J., entered December 5, 1914, upon findings in favor of the defendant, dismissing an action on an account stated, tried to the court. Affirmed.

McCafferty, Robinson & Godfrey, for appellant.

Morris & Shipley and *Paul S. Dubuar*, for respondent.

PARKER, J.—The plaintiff, United Iron Works, seeks recovery from the defendant, The Rathskeller Company, of the sum of $881, claimed as the purchase price and cost of installing a compressor in the refrigerating plant of the defendant. The trial was had in the superior court without a jury, resulting in findings and judgment in favor of the defendant denying the relief prayed for, from which the plaintiff has appealed.

Looking to the allegations of the complaint, the plaintiff's right of recovery appears to be rested alone upon the theory of an account stated, but in subsequent pleadings and upon the trial it appears that plaintiff's right of recovery is rested both upon that theory and *quantum meruit*.

It seems quite plain to us that there was no agreement, express or implied, between the parties constituting an account stated. There is no evidence in the record pointing to such an agreement, other than the rendering of a bill and repeated demands for payment thereof by appellant and refusal to pay the same by respondent, though such refusal consisted, we assume for argument's sake, of its silence. This does not of itself constitute an implied agreement as to any sum due to appellant and, therefore, does not entitle appellant to sue thereon as an account stated. *Merritt v. Meisenheimer*, 84 Wash. 174, 146 Pac. 370; *Blanck v. Pioneer Mining Co.*, 93 Wash. 26, 159 Pac. 1077.

Touching the question of *quantum meruit*, we think the following is a sufficient summary of the facts necessary to be noticed: In the summer of 1911, appellant furnished and

installed for respondent certain machinery, including a compressor, for the equipment of its refrigerating plant. This was to be done in pursuance of a written contract and specifications made a part thereof, entered into in January of that year. The contract price was $2,905, which was to be paid in three installments, the last of which was to be paid sixty days after the completion of the installing of the machinery. The machinery being installed, as respondent was led to believe in accordance with the contract, final payment was made therefor within the time specified in the contract. The contract contained express warranties as to the workmanship, materials and capacity of the machinery, which we deem unnecessary to here notice in detail. The compressor furnished as a part of the machinery proved defective, yet not so much so as to entirely prevent its operation. This fact became known to appellant upon the commencement of the operation of the machinery immediately following its installation. Appellant used some effort from time to time to cure the defects and to cause the compressor to operate properly, which efforts of appellant continued until the summer of 1913. The final payment upon the purchase price made by respondent manifestly was not at the time considered by the parties as an acceptance of the machinery so as to relieve appellant from its obligation under its warranties to remedy defects therein, and repeatedly thereafter appellant assured respondent that the defects were of but minor consequence and would and could be remedied. They were, however, of a serious nature, the principal one of which was inside the cylinder of the compressor and consisted of a defective working part that ultimately resulted in the scoring of the walls of the cylinder so that, finally, in the early summer of 1913, the compressor was, from that cause, practically wrecked. The appellant then furnished and installed for respondent a new compressor in the place of the original one, the reasonable value of which was $881, should it be held that respondent was required to pay for the same. It is the value of this

new compressor that appellant seeks to recover from respondent in this action.

It seems plain to us, as it did to the trial court, that the furnishing of this new compressor was nothing more than appellant was required to do under the warranties of its original contract, and that therefore respondent was not required to pay for its installation by appellant. The only escape we see for appellant from its obligation to furnish this new compressor would be upon the theory that, by reason of lapse of time and use of the original compressor, respondent had waived its rights as against appellant so far as the warranties of the original contract are concerned. This becomes a question of fact in the light of all the circumstances shown. In view of the hidden defects not readily discoverable by respondent; appellant's continued promises and efforts to cure the same from the time of the original installation up until the time of the furnishing of the new compressor, and appellant's assurance from time to time to respondent that the defect was not of serious consequence, we agree with the findings and conclusions of the trial court touching this branch of the case. We have read the evidence with care and deem it of no profit to review it in detail here.

The judgment is affirmed.

MORRIS, C. J., MAIN, CHADWICK, and ELLIS, JJ., concur.

[No. 13546. Department One. December 29, 1916.]

BERT WILLETT, *Respondent*, v. OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, *Appellant*.[1]

RAILROADS—ANIMALS ON TRACK—NEGLIGENCE—EVIDENCE—SUFFICIENCY. The jury is warranted in finding negligence by a railroad company in killing a horse on the tracks within yard limits where fences were not required, although the horse was a trespasser, where it appears that the horse was seen by the fireman of a passenger train when about five hundred feet distant, and that there was evidence that the train might have been stopped within that distance.

SAME—ANIMALS ON TRACK—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. Where the law prohibiting stock from running at large was not in force, it is not contributory negligence, as a matter of law, for a man to turn his horses out on the common where they could go upon unfenced railroad tracks, where it appears that he lived about a mile away and the horses had been in the habit of grazing in the other direction and had not theretofore gone upon the tracks.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered January 31, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

Bogle, Graves, Merritt & Bogle, for appellant.

Forney & Ponder, for respondent.

PARKER, J.—This is an action in which the plaintiff seeks recovery of damages which he claims resulted from the killing of a horse belonging to him, by the negligent operation of one of the trains of the defendant railroad company. Trial was had in the superior court sitting with a jury, which resulted in verdict and judgment in favor of the plaintiff, from which the defendant has appealed.

The principal contention of counsel for appellant is that the trial court erred in denying its motion, made at the close of all of the evidence, for a directed verdict in its favor,

[1]Reported in 162 Pac. 14.

which motion was rested upon the ground that the evidence called for the conclusion, as a matter of law, that appellant was not guilty of any negligence resulting in the death of respondent's horse, and also upon the ground that the evidence called for the conclusion, as a matter of law, that respondent's own negligence contributed to and caused the death of his horse.

The killing of respondent's horse, for which he here seeks recovery, occurred near the westerly end of, and within the side track or switch limits, at Lincoln Station, in Lewis county, and therefore at a point on appellant's track which was not required by law to be enclosed by fence. Rem. Code, § 8730. From a distance of half a mile or more east of appellant's depot at Lincoln Station to a distance of one thousand feet or more west of the depot, its main track runs in a straight line in a direction which, for present purposes, we will call west. Appellant's two or three side tracks at that station are south of the main track and for the most part west of the depot. An engineer and fireman upon an engine of a train running west over this straight portion of appellant's main track have an uninterrupted view along its whole length, and also for a considerable distance upon each side of its whole length. The small depot on the south of the main track and the side track next south appears to be the only building near or upon this portion of appellant's right of way. This, in any event, is true to the west of the depot. All along this straight portion of the track, it is elevated more or less above the natural level of the ground. To the west of the depot, the track is elevated, varying from two to twelve feet above the ground upon the north, the embankment along that portion being quite steep. At the foot of the embankment on the north, is a low tract of ground where stock are accustomed to graze. Some six hundred feet west of the depot, there is a path leading from this low ground diagonally up along the side of the embankment to the top, enabling stock to go upon the tracks. This apparently is the only means

of access to this portion of appellant's tracks from this low ground west of the depot, except at the road crossing immediately west of the depot. There also appears, from the fireman's testimony, to be some low ground with grass growing on it such as might attract stock to the south of the tracks. It does not appear, however, how stock could gain access to this low ground other than by crossing over the tracks, either from the path on the north side or by way of the road crossing near the depot.

Early in the morning of the day in question, but after the coming of daylight, a passenger train of appellant, consisting of an engine and four cars, was proceeding west through Lincoln Station. There is some conflict in the testimony as to whether it stopped at the depot, though that is not very material here. After passing the depot, at a point some seven hundred feet farther west, when it was running at some considerable speed, probably about twenty-five miles per hour, the engine struck respondent's horse, seemingly knocking or carrying it forward for some little distance and throwing it to the left or south side of the main track, its head striking a freight car standing on the side track and apparently killing it instantly. The train did not stop or even slacken its speed between the depot and the place it struck the horse. Assuming that the train stopped at the depot, as the jury might have concluded in the light of the evidence, it seems almost certain that the train was moving at a constantly increasing speed from the time it started therefrom until it struck the horse, about seven hundred feet to the west. Tracks of a horse, which by reason of their peculiarity were identified with reasonable certainty as those of respondent's horse, were, within an hour or two after the accident, found in the path on the north side of the embankment and also along the main track to the west, indicating that the horse had come up the path from the low ground to the north and was going west along the main track when it was struck. The

only witness testifying upon the trial who saw the horse upon the tracks and when it was struck was the fireman upon the engine. His story is, in substance, that, after passing the depot a distance of from one hundred to two hundred feet, he saw two horses come up the bank from the low ground on the south and proceed across the tracks. One passed over in front of the engine, the other, when upon the main track, turned back and was struck by the engine upon the hip and thrown forward almost directly in the direction the train was running, and fell to the left, as we have already noticed. The evidence warranted the jury in believing that the horse was not struck by the engine until the train had run a distance of about seven hundred feet from the depot, which would be about five hundred feet from where the engine was when the fireman first saw the horses coming up over the south embankment and proceeding across the tracks. From the south embankment to the main track at this point is about seventy feet. There is in the record testimony warranting the jury in believing that the train could have been stopped within a distance of five hundred feet, or less, from where it was when the fireman said he first saw the horses, especially if the train stopped at the depot, requiring it to start from a standstill at that point. This summary of the facts we think is as favorable to the contentions of the counsel for the appellant touching the question of its negligence as the record before us will admit of.

If we should ignore the testimony of the fireman, which was given for appellant after the respondent had rested his case, and look only to the evidence as it then stood, we would have a case substantially the same as the late case of *Snodgrass v. Spokane & Inland Empire R. Co.*, 87 Wash. 308, 151 Pac. 815. That case was one involving the killing of horses by an electric railway train upon the track at a place where it was not required by law to be fenced, but where the horses were technically trespassers, as in this case, the accident oc-

curring at a point where the motorman had an unobstructed view along a half mile of straight track elevated a little above the natural ground, the horses having come upon the track and proceeded along it in the direction the train was running, as evidenced only by their own tracks made in the snow. The holding was that the jury was warranted in concluding that the motorman must have seen the horses upon the track in time to have avoided the accident. The only difference between that situation and this is that the tracks of the horses made in the snow were possibly somewhat more plain and easily identified than in this case. However, we need not rest our conclusion that there was evidence warranting the jury finding the appellant negligent alone upon this theory. But in view of this evidence, together with the testimony of the fireman that the horses were actually seen by him when the train had proceeded a distance of only from one hundred to two hundred feet past the depot, and the fact, as the jury might have believed from the evidence, that the train thereafter ran at increasing speed some five hundred feet further before the horse was struck, we cannot escape the conclusion that the jury was warranted in believing that the horse must have been seen by the engineer and was actually seen by the fireman in time to have avoided the accident. It seems to us that, under such a state of facts, the fact that the horse was technically a trespasser, and the rule that the appellant owed it no duty before it was seen by the engineer or fireman, does not, as a matter of law, free appellant from the charge of negligence.

Was respondent negligent? It is contended in appellant's behalf that respondent was guilty of contributory negligence, and it should be so decided as a matter of law, because he allowed his horses to run at large in the neighborhood of appellant's tracks. It appears that respondent lives and keeps his horses at a distance of about a quarter of a mile from the crossing at appellant's depot; that he was in the habit

of turning his horses out to run at large during the nighttime; that they were in the habit of grazing at a place farther away from appellant's tracks than respondent's home, and had not, before the time in question, gone upon appellant's tracks or to the low ground to the north of the tracks where other stock seemed to be in the habit of going. It was not shown that the law relating to the running of stock at large, Rem. Code § 3172, was in force by order of the county commissioners in that portion of Lewis county, hence it seems plain that the mere fact that respondent allowed his horses to run at large during the nighttime did not render him guilty of negligence. It seems to us, therefore, that the question of his contributory negligence in this regard was such that appellant cannot complain of the fact that the trial court submitted that question to the jury. Under the *Snodgrass* case, *supra*, in the decision of which the case of *Dickey v. Northern Pac. R. Co.*, 19 Wash. 350, 53 Pac. 347, is distinguished, it seems plain that it could not be determined, as a matter of law, that respondent was guilty of contributory negligence.

Contention is made that the trial court erred in the giving of a number of its instructions and in refusing to give others requested by counsel for appellant. These claimed errors are but briefly discussed by counsel. What we have already said, we think, in effect disposes of these contentions. The principal argument directed against the ruling of the court touching the instructions seems to be, in substance, that the court erred in submitting to the jury the question of respondent's contributory negligence instead of in effect deciding it by its instructions as a matter of law, as requested by counsel for appellant. It seems to us that the instructions given, and those requested and refused to be given by the court, do not require further notice, in view of what we have already said.

We are of the opinion that the case was properly submitted to the jury, and that the questions of appellant's neg-

ligence and respondent's contributory negligence could not be determined as a matter of law.

The judgment is affirmed.

MORRIS, C. J., MAIN, ELLIS, and CHADWICK, JJ., concur.

[No. 13548. Department One. December 29, 1916.]

FRED HERREN *et al.*, *Respondents*, v. KANSAS CITY CASUALTY COMPANY, *Appellant*.[1]

MUNICIPAL CORPORATIONS—PUBLIC WORKS—CONTRACTOR'S BOND—NOTICE OF CLAIM—SUFFICIENCY. A notice of a labor claim against the contractor's bond for the improvement of the "Humptulips-Quinault County Road," sufficiently describes the work by referring to it as the "Quinault Road," where it was commonly known by that name.

SAME. Where a notice of a labor claim against the contractor's bond sufficiently identifies the improvement and work, neither the county nor the surety can object that the notice is insufficient in not stating exactly the full names of the contractor and surety, where the variance was slight and could not have misled any one.

Appeal from a judgment of the superior court for Grays Harbor county, Sheeks, J., entered December 31, 1915, upon findings in favor of the plaintiffs, in an action on a contractor's bond, tried to the court. Affirmed.

William E. Campbell, for appellant.

E. E. Boner, for respondents.

PARKER, J.—The plaintiffs, as copartners, seek recovery from the Kansas City Casualty Company upon a bond executed by it in compliance with Rem. Code, § 1159, to secure subcontractors and others furnishing labor and material for the carrying on of certain public work. Trial before the superior court without a jury resulted in findings and judgment in favor of the plaintiffs, from which the defendant, casualty company, has appealed. The contractor, Spokane

[1]Reported in 162 Pac. 17.

Paving & Construction Company, which executed the bond as principal, while also named as a defendant in the complaint, was not served with summons, evidently because its officers and agents had abandoned the work and absented themselves so that none of them could be found.

In May, 1913, the Spokane Paving & Construction Company entered into a contract with Chehalis county, now Grays Harbor county, agreeing to construct a specified portion of the "Humptulips-Quinault County Road" which was commonly known and called "The Quinault Road." It was to be paid portions of the contract price monthly as the work progressed, in accordance with estimates to be made by the county engineer. Soon thereafter the Spokane Paving & Construction Company, as principal, and appellant, Kansas City Casualty Company, as surety, executed a bond in accordance with Rem. Code, § 1159, to secure subcontractors and others furnishing to the contractor material and labor for the carrying on of the work. Thereafter, while the work was in progress, respondents and the contractor, Spokane Paving & Construction Company, entered into the following subcontract:

"Sept. 10, 1913.

"This Agreement made and entered into by and between the Standard Transfer Company, and the Spokane Paving & Construction Company, whereby the Standard Transfer Company agreed to complete the grading of the hill in vicinity of station 65 on the Quinault Road; and the Spokane Paving & Construction Company agrees to pay the Standard Transfer Company 25-32 of the amount received from the county for such work, payment to be based on the engineer's estimate allowed the Spokane Paving & Construction Company as received by the Spokane Paving & Construction Company from the county. (Signed) Spokane Paving & Construction
"Standard Transfer Company Company.
"By F. Herren. By Henry J. Lilienthal."

Respondents promptly proceeded with their work under this subcontract until they had earned, according to its terms, the sum of $639.05, at which time the Spokane Paving

& Construction Company had received payments from the county, which in turn entitled respondents to payments as specified in its subcontract, but which payments the Spokane Paving & Construction Company neglected to pay to respondents, though acknowledging that respondents were entitled thereto according to the subcontract. Thereupon respondents informed the Spokane Paving & Construction Company that they would not proceed further with the work until paid the amount then due them, and not being so paid, they did not proceed further with the work. The evidence warrants the conclusion that this not only constituted a breach of the subcontract on the part of the Spokane Paving & Construction Company, but also that that company then consented to respondents treating the subcontract and their obligations thereunder at an end. Thereafter, with a view of perfecting their claim against the Kansas City Casualty Company upon the bond, respondents filed with the board of county commissioners the following writing:

"To the Honorable Board of County Commissioners of Chehalis County:

"Notice is hereby given that the undersigned Fred Herren and Will Herren, doing business as Standard Transfer Company have a claim in the sum of $639.05 against the bond taken from *Spokane Paving Company as principal* and *Kansas City Surety Company as surety* for the work of grading, use of teams, grubbing and use of scrapers in connection with the contract let, and improvements being done on what is known as *the Quinault Road.*"

"(Signed) Standard Transfer Company
"By Fred Herren."

The names we have italicized in this notice it will be seen are not exactly the same as the names appearing in the principal contract, subcontract, and bond. Thereafter this action was commenced, resulting in judgment against the surety for the amount claimed.

The principal contention made in appellant's behalf is that this notice of respondents' claim filed with the county com-

missioners is not such as is required by Rem. Code, § 1161, as a prerequisite to their right to sue the surety, in that the names of the principal contractor, surety, and work are not correctly stated in the notice and do not identify with sufficient certainty the bond upon which respondents seek recovery. We have seen that, while the correct name of the work or improvement was "Humptulips-Quinault County Road," it was also commonly known as "The Quinault Road." We think, therefore, that so naming it in the notice sufficiently informed both the county and the casualty company of the fact that respondents' claim was made with reference to the contract for the construction of that road. It seems equally plain to us that, since the notice sufficiently identified the work and improvement, neither the county nor appellant could fail to understand therefrom that it was the contract entered into by the Spokane Paving & Construction Company for the construction of that improvement that was meant by the notice, though the contractor was therein referred to as the "Spokane Paving Company." The reference to the work and the contractor being thus rendered sufficiently certain, leads us to the conclusion that neither the county nor appellant was misled by respondents' claim as stated in their notice "against the bond taken from the Spokane Paving Company as principal and Kansas City Surety Company as surety," though those are not exactly the names of the contractor and surety. It seems plain to us that neither the county nor appellant could fail to understand from the notice that it was a claim against the bond here sued upon. It manifestly was so considered by the county as evidenced by the indorsements on the back thereof made at the time of its filing, where the names of both the contractor and surety are correctly written as a portion of such indorsement of its filing.

In the early case of *Installment Building & Loan Co. v. Wentworth*, 1 Wash. 467, 25 Pac. 298, there was involved the sufficiency of a lien notice wherein the defendant and

owner was not correctly named, the notice in other respects being admittedly sufficient. Holding that the lien notice was sufficient, Judge Hoyt, speaking for the court, at page 469, said:

"In the notice of claim of lien the defendant corporation was described as 'Installment Building and Loan Association,' whereas, in fact, its true name was 'Installment Building and Loan Company.' The notice of claim of lien is attacked on the ground of its variance between it and the pleadings and proofs. We do not think that the variance was material. The corporation itself was making the improvement and could not have been misled by the slight error in stating its name. The case might be different if the property of the corporation was sought to be charged for an improvement for which it had not contracted."

It seems to us that the difference in the name used in the notice and the correct names in this case is no greater than the difference in that case. The express contractual obligation of appellant, casualty company, was to protect claims of the nature of respondents', so we think this case does not fall within the possible exception suggested by the closing sentence of the above quotation.

In *Strandell v. Moran*, 49 Wash. 533, 95 Pac. 1106, there was involved an alleged defective notice in that it was not signed by the claimant as provided by Rem. Code, § 1161, it being signed as follows: "Andrew Strandell by D. T. Winne, her attorney." It appeared that the claimant and plaintiff was Freda Strandell, who furnished the materials through her agent, Andrew Strandell, which apparently accounted for the signing of the notice in this peculiar manner. Holding that the notice was sufficient to entitle her to maintain the action, Judge Fullerton, speaking for the court, said:

"The notice was signed, it will be observed, by Andrew Strandell without the addition of the word 'Agent,' and this omission is thought to render the notice void, since, as it is claimed, such a signing is neither a signing by the real nor the trade name of the claimant. But the primary purpose of the

statute is notice. It is intended to inform the city and the bondsmen of the contractor who, if any, of the laborers, mechanics, and materialmen have not been paid, and any form of notice that does this, and does not mislead either the city or the bondsmen to their injury, is sufficient to comply with the statute. In the case before us there is no pretense that either the city or the bondsmen were misled, . . ."

In *Cascade Lumber Co. v. Aetna Indemnity Co.*, 56 Wash. 503, 106 Pac. 158, the notice involved was claimed to be insufficient because there was not stated therein any claim against the bond or the surety, but only that the claimant "has a bill against the high school building in the city of North Yakima, Yakima county, Washington, for materials" furnished, etc. This notice of claim was not only filed with the proper public officials, but it was also served upon the surety company against which recovery was sought. Holding that the notice was sufficient to entitle the claimant to sue the surety, Judge Mount, speaking for the court, at page 508, said:

"It is true that the notices filed and served upon the Aetna Indemnity Company November 21, 1907, do not say specifically that the materialmen have a claim against the *bond*. But they do say that the claimant has a bill against the high school building for materials furnished to the builders to be used in the building, and the amount thereof. The notices were addressed to the surety company, and served upon it. These notices were the *substance* of the notice provided for by the statute. When it was addressed to and served upon the surety, that company must have known that the notice was given to them solely by reason of the bond, and that the claimants meant thereby to claim against the bond. The surety company could not have been misled thereby. These notices were therefore sufficient under the statute."

The reasoning of these decisions, we think, leads to the conclusion that the notice of claim in this case was such as to fully inform both the county and the casualty company that respondents' claim was made against the bond given by appellant, casualty company, with reference to the contract

executed by the Spokane Paving & Construction Company for the construction of the Humptulips-Quinault county road.

Our attention has been called to our decisions in *Robinson Mfg. Co. v. Bradley*, 71 Wash. 611, 129 Pac. 382; *Carstens Packing Co. v. Empire State Surety Co.*, 84 Wash. 545, 147 Pac. 36; and *Rodgers v. Fidelity & Deposit Co.*, 89 Wash. 316, 154 Pac. 444, in support of appellant's contention against the sufficiency of respondent's notice. We think none of these cases are controlling here. In the *Robinson Mfg. Co.* case, the claimed notice consisted only of correspondence by the claimant addressed to the treasurer of the library board, which amounted to nothing more than a demand or request for the payment of the amounts claimed to be due the claimant, with nothing in any of the letters which could be construed as asserting a claim against the surety upon the bond. In the *Carstens Packing Co.* case, there was involved a notice of claim which purported to assert a claim against three separate bonds given with reference to three separate improvements without segregation as to the amount claimed against each. This was held by the court to be an invalid claim, adopting by analogy the rule that lien claims attempted to be so asserted are held invalid, as in *Sarginson v. Turner Investment Co.*, 69 Wash. 234, 124 Pac. 379. In the *Rodgers* case, the notice consisted of a letter with an inclosed bill and a request for information as to what bonding company became surety for the contractor. No claim was therein asserted as against the bond. The letter could be construed as nothing more than an assertion of a claim against the contractor and possibly as against an unpaid balance due the contractor from the state. It was held that, because of this want of claim against the bond, the claimant had not acquired the right to sue the surety.

Other contentions made in appellant's behalf we think have been sufficiently answered by what we have already said. The judgment is affirmed.

MORRIS, C. J., MAIN, ELLIS, and CHADWICK, JJ., concur.

[No. 13558. Department Two. December 29, 1916.]

KING COUNTY, *Appellant*, v. SEATTLE CEDAR LUMBER MANUFACTURING COMPANY, *Respondent*, ANNA ANNAND *et al.*, *Defendants*.[1]

EMINENT DOMAIN — COMPENSATION — DAMAGES — READJUSTING BUILDINGS—REDUCING EXPENSE. Under a liberal construction of the constitutional provision requiring payment for private property taken for public use, and the general rule requiring one who is damaged to do what he can to minimize his damages, a property owner may recover damages in eminent domain proceedings to cover the cost of readjusting its buildings in contemplation of a second condemnation, where, after a condemnation to raise water in a canal to a seven-foot level, it was known that the government would raise the water two feet further and another condemnation therefor would be necessary; and a readjustment of the buildings to the seven-foot level by one operation, and afterwards to the nine-foot level, would have doubled the expense; since the property owner was not proceeding voluntarily to readjust its property and was in duty bound to minimize the damages, and the rule limiting damages to the value of the property at the time of the trial would not be just.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered March 16, 1916, upon the verdict of a jury awarding damages in condemnation proceedings. Affirmed.

Alfred H. Lundin and *S. M. Brackett*, for appellant.

Higgins & Hughes (*Hyman Zettler*, of counsel), for respondent.

HOLCOMB, J.—In 1895, King county, in accordance with its agreement with the United States government, in aid of the proposed government canal to connect Salmon Bay with Lake Washington and Lake Union, instituted and prosecuted to final judgment three certain condemnation actions against shore land owners, paid the damages awarded therein, and conveyed to the government of the United States all rights thereby secured. Each of those actions was for the

[1]Reported in 162 Pac. 27.

purpose of acquiring a different right of way through a different strip of territory and the right to flood adjacent property necessary for the canal "according to the existing plans of the United States government." The plans and specifications for the canal which had been officially adopted by the government call for raising the waters, ultimately, to a height of nine feet above city datum and flooding the adjacent property to that level. In two of the cases, the condemnation judgment appropriated the right to flood to the level required by the government plans, which were made a part of those proceedings, viz., nine feet above city datum. In one of those actions, King County v. Allen, which affected the property around Salmon Bay, including respondent's property, the judgment specifically recited that the right was acquired only to bring the waters up to a level of seven feet above city datum. The right to raise the waters to a level of nine feet above city datum was disputed by these property owners, and the government desires ultimately to raise the waters of the canal nine feet above city datum. It is conceded that the county acquired the right to raise the waters of the canal at any time to the level of seven feet above city datum. To put the controversy at rest as to the difference of two feet, this action was brought by order of the board of commissioners of King county. Upon the trial, the court held, as to the property involved in the two old cases, that King county had acquired the right to flood to nine feet because the judgment recited that the property was to be flooded to the levels of the plans adopted by the government, which plans provided for bringing the waters up to nine feet. As to the property around Salmon Bay and which was included in the third suit, the court held that the right was acquired to only seven feet because the judgment specifically recited that the right was condemned to flood to that elevation only, and it therefore impaneled a jury to try out the damages for raising the water the additional two feet.

Upon the question of the damages which would be caused to the property of the respondent by the proposed improvement, the trial court, over the objection of appellant, allowed respondent to introduce testimony to the effect that, in January, 1915, W. H. McEwan, an officer of respondent company, asked Major Cavanaugh, United States engineer in charge of the construction of the canal locks, when the government intended to raise the waters of the canal. The witness testified that Major Cavanaugh replied that, while he could not say definitely, there was a possibility that in July, 1915, the government might wish to raise the water to an elevation of one or two feet above city datum; that the water would not be raised to the nine-foot level until December 1 or perhaps later. The witness testified that the water raised even to the height of two or three feet above city datum would have caused a shut down of the mill; that to raise the mill without a shut down would require several months' time; that Major Cavanaugh, when asked if he would advise respondent to commence raising the plant at once, stated that he had told the respondent the facts and that respondent must use his own judgment, and refused to give any advice upon the subject; that, prior to the formal notice of February 12, the witness, in company with Mr. Hughes, his attorney, called upon Mr. Evans, deputy prosecuting attorney of King county, who informed them that he had been working upon the preparation of the present condemnation suit, and that he had tried to get the commissioners to employ an engineer to get the levels of the property to discover its then condition; that the witness urged that these levels be taken at once before any alterations or adjustments were made; that Mr. Evans asked respondent to delay the proposed change for a week in order that he might again try to have the commissioners authorize some one to take levels upon existing buildings; that the respondent waited a week, heard nothing from Mr. Evans, and then proceeded to raise the shingle kiln; that Mr. Evans at this conference gave respondent no assur-

ance that respondent would be protected in making any changes prior to the date of the trial. On February 12, 1915, respondent gave notice to the prosecuting attorney of King county that it would, on February 19, 1915, start making the adjustment occasioned by the raising of the water above the seven-foot level. It was stated in that notice that it was for the protection of the county so that it might have its county engineer and other appraisers on the ground during the ensuing week to check the figures of the lumber company either as to the cost of making the adjustments it proposed or the necessity therefor, and it was stated that it was impossible to wait any longer than the above date, as the making of the adjustments was a matter that would take many months and it had been notified by the government that it should proceed with dispatch in the matter.

No response was made by King county or the county attorney to the foregoing notice and, on the 19th of February, respondent began to adjust its plant, taking it up section by section so as to keep the mill running in the meantime. It would appear that there were two courses open to it. It could readjust its property to the seven-foot level, thereby protecting its property, and when the water was raised to the nine-foot level, six or eight months away, then make a second adjustment from the seven-foot level to the nine-foot level to protect itself against the last raise; or it could make all its readjustments in one, in advance, and have its mill in proper shape to meet the canal conditions when finally completed. The government had been actively engaged in building the canal for two years or more prior to February, 1915, and at that time the canal was largely dug and the locks were being constructed so as to bring the water up to the nine-foot level when completed.

It seems that the first alternative of the lumber company, that of making the readjustment in two stages, would be twice as expensive as the second, and would have resulted in the waste of thousands of dollars. Consequently the least

costly method was adopted and the whole readjustment to meet the plan of the canal as completed was made at once. The evidence is undisputed that, had the readjustments been first made to the seven-foot level and had the respondent waited to make the second readjustment until after the trial of the condemnation action, the amount of damages to which it would be entitled in this proceeding on account of the second readjustment would have been several times what it obtained below by virtue of its having completed the readjustment at once. In other words, the cost of the readjustment from seven feet to nine feet, to pay for which this condemnation proceeding was instituted, would be increased at least two-fold by making the change in two adjustments, first to seven feet and then to nine, instead of in one operation. Therefore, by anticipating the necessity of making the final adjustment, the damages payable by King county in this proceeding were undoubtedly cut in half. At the time of the trial, the shingle dry kiln and the eastern tramways had been adjusted to the nine-foot level. The remainder of the mill, although it was in process of adjustment, had not been raised above the seven-foot level. The admitted additional cost for carrying these parts of the mill on up two feet higher, which was necessitated by the county's condemnation so as to be above nine feet, was $3,762.66. It was further conceded that, had they been adjusted at seven feet, it would have cost several times as much to then raise them up to nine feet.

At the conclusion of the evidence, the court submitted this issue to the jury under the following instruction:

"You are instructed that if these necessary changes, if any, have already before the trial of this case been made, still you may consider them in estimating the property owners' damages, if you find that those changes were made solely because of these improvements and were made prior to the trial only because such earlier alterations would reduce the damages to be caused by this improvement and because it was necessary to start making such adjustments in order to be

above water when the canal was opened and were not made voluntarily."

The jury thereupon found in favor of respondent on these items and brought in a special verdict of $3,762.66 for the adjustment so made, representing that portion of the cost thereof of adjusting the property from the seven-foot level to the nine-foot level. This item of recovery is the sole subject of dispute.

It is the contention of the appellant that the respondent cannot recover damages even in the amount to which it lessened it. It contends that a property owner, learning that a condemnation suit is liable to be commenced against him aimed at acquiring a right to land by flooding it, is not entitled, prior to the commencement of the suit, to alter the condition of his buildings and, when the suit is finally instituted, prove as an element of damages the cost of raising his building above the flood level, when the work of raising was done without any assurance by the petitioners that the owner would be protected therein. Our decisions in *Grays Harbor & P. S. R. Co. v. Kauppinen*, 52 Wash. 238, 101 Pac. 835, and *Distler v. Grays Harbor & P. S. R. Co.*, 76 Wash. 391, 136 Pac. 364, are cited to the effect that the rule fixing the value of the property as of the time of such trial is not only definite, but just to both the owner and the public. Moreover, it would seem that no other construction could be adopted without doing violence to the language of our constitution. And in the *Distler* case, where the respondent railway company had constructed its line upon a city street without having first condemned the right to do so as against the adjacent property owners, the court held that in this state the rule applicable to condemnation proceedings is that the damages shall be ascertained as of the time of trial.

It is then contended that, the date of the trial being fixed as the time at which damages are to be estimated, the owner may improve his property to that date, and may recover the value of the improvements if taken, or their damages if they

are damaged. Conversely, that if the property owner, of his own motion without any contract or assurance that he will be protected in so doing, alters his property prior to the trial so that the proposed improvements will not injure his buildings in their altered condition, the condemning party shall not be called upon to pay damages where no damages can be suffered; that the respondent in this case acted upon its own advice and at its peril.

We think appellant takes too narrow a view of the effect of our own decisions and of the provision of our constitution relating to the taking and damaging of private property for public purposes. From the beginning of our jurisprudence under our constitutional provision, we have consistently held that this constitutional provision shall be liberally construed in favor of the private property owner. The language of the constitution is to be construed liberally so as to carry out and not defeat the purposes for which it was adopted. 1 Lewis, Eminent Domain, § 360.

It cannot be said that the respondent here was proceeding voluntarily to adjust his property to the requirements of the government in the construction of the canal, for the government undoubtedly had the intention to construct the canal so as to raise the water finally to the level of nine feet above city datum. It had the acquired right to raise it to seven feet. It was known that the right to flood the additional two feet would be positively required. The county proceeded for no other purpose than to acquire the right, which it had not acquired as to these property owners, to raise the water from the seven-foot level to the nine-foot level. It was known that, when the government should raise the water to that level, respondent's property would be injuriously affected and damaged thereby. To have left the mill in a condition to meet the flooding of the water to the seven-foot level would have been certainly to repeat the operation of readjusting it so as to meet the condition of raising the water to the nine-foot level. It is a general rule in this state and elsewhere that the

law insists that one who is damaged shall do what he can to minimize his damage. In the case of *In re Trustees of New York & Brooklyn Bridge*, 18 App. Div. 8, 45 N. Y. Supp. 484, Judge Cullen, for the court, discussing a similar situation, where the owner was proceeding to erect a building when he was notified of the intention to condemn a portion of his lot, and the owner, immediately before the bringing of the condemnation proceeding, ordered his plans changed, tore down a portion of the building on part of the lot to be condemned so as to conform to the proposed improvement and lessen the damages to his property by reason of the improvement, and incurred expenses therefor, said:

"This is not the ordinary case of a landowner seeking damages because his inchoate and unexecuted intention to improve the property in some particular manner is necessarily modified or frustrated. The work of constructing the building was actually prosecuting at the time of notice. It may be that the defendants were not prevented from continuing their improvement until the time the property was actually acquired. In such case the plaintiffs would have been compelled to pay for the injury to the structure. Now, assuming that the defendants had that right, still the fact that they adopted the other course of at once modifying their building in accordance with the notice given them by the trustees, and thus saving expenditures unnecessarily to be made, should not operate to their prejudice. Their action in proceeding at once to change the plan of the building and its construction was in the interests of the plaintiffs, as well as to their own. Whatever may be the general rule governing awards in condemnation proceedings, there may be special circumstances taking any particular case out of the rule. It would shock our sense of justice that in this case the defendants should not be allowed the actual cost and expenditure incurred by them in changing the plan of their structure."

A like case is found in *St. Louis v. Brown*, 155 Mo. 545, 56 S. W. 298. At the time of the passage of an ordinance authorizing the taking of thirty-five feet from the lot by condemnation, the owner was proceeding to erect a large build-

ing on the property. Immediately upon the signing of the ordinance and before the institution of the condemnation proceedings, the owner adjusted a part of the building already constructed so as to meet the condemnation plan and reduce the damages. The cost of so readjusting amounted to some $7,800, and was included in the amount of damages in the subsequent condemnation award. In holding that the award was proper, the court said:

"When this ordinance was approved, defendant Brown's contracts were let for the construction of his building at the cost of $252,000. What was his duty under the circumstances? Should he have gone on with the construction, and magnified the damages the city should pay him, either with the determination to resist the enforcement of the ordinance or with a view to making it as costly a proceeding as possible to the city? Or should he suspend all operations until the cause and been carried through the courts, and its result definitely known? Good faith and justice demanded, in the words of this court last cited, that he should use 'all reasonable exertion to protect himself and avert as far as practicable the injurious consequences of such act.' . . . He took the most conservative and prudent course, gave faith to the city in carrying out its ordinance, and averted, as far as possible, the damages consequent on the city's act. . . . If he is to have no compensation here for that loss, then he is damaged to that extent by this act of the city, and he has no other redress."

In *Peck v. Chicago Railways Co.*, 270 Ill. 34, 110 N. E. 414, the court said:

"A person injured by another's breach of contract or tort is bound to use reasonable care to render the injury as light as possible and to protect himself from unnecessary injury. . . . Expenses reasonably and prudently incurred in good faith in making a proper effort to diminish the loss may be recovered, whether the effort is successful or not. . . . It is true that in this case there is no breach of contract or tort. The declaration makes no charge of negligence or complaint as to the manner in which the improvement was made or the skillfulness with which the labor upon it was performed. The damages must therefore be estimated under the same rules

as upon a petition to condemn the property. We see no reason why a different rule should prevail in such a case, and if from the evidence it appears that expenses were incurred by the appellees in good faith and the exercise of a reasonable and prudent judgment in an effort to reduce the damages, those expenses should be regarded as a part of the damages to their property."

In *Chicago, S. F. & C. R. Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931, the court said:

"It is the duty of one sustaining damages by reason of the act of another to use all reasonable exertion to protect himself and avert, as far as practicable, the injurious consequences of such act. . . . It was, therefore, plaintiff's duty to adjust his property to its changed condition as soon as it could reasonably be done, and in such manner as would avert such damages as could be avoided by reasonable endeavors and expense."

We consider the reasoning of the foregoing cases exactly applicable to the case at bar, that the respondent did no more than its duty, and the appellant is in duty bound to rebate the respondent's loss and damage occasioned it by the readjustment of its property to meet the needs specified in the condemnation proceeding. This is manifestly all that was done by the court and jury.

The verdict and judgment are therefore affirmed.

MORRIS, C. J., MOUNT, FULLERTON, and PARKER, JJ., concur.

[No. 13563. Department Two. December 29, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v. A. R. ROLETTE, *Appellant*.[1]

EMBEZZLEMENT — BY AGENT — DEFENSES — APPROPRIATION UNDER CLAIM OF TITLE—INSTRUCTIONS—STATUTES. Upon a prosecution of a broker for larceny by embezzlement in withholding, as agent of the purchaser, part of the purchase price which he had deducted as his commission, in which there was conflicting evidence as to defendant's misrepresentations and as to the fact of agency, the defendant is entitled to an instruction to the jury in accordance with Rem. Code, § 2608, which provides that it shall be a sufficient defense to a prosecution for larceny that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though the claim is untenable.

Appeal from a judgment of the superior court for King county, Ronald, J., entered January 15, 1916, upon a trial and conviction of grand larceny. Reversed.

G. C. Israel, for appellant.

Alfred H. Lundin and *Frank P. Helsell*, for respondent.

PARKER, J.—The defendant, Rolette, was charged, by information filed in the superior court for King county, with the crime of grand larceny, in that he, having in his possession, as agent and bailee of Alice Buttler, the sum of $40.85 in money belonging to her, did feloniously withhold and appropriate the same to his own use with intent to deprive her thereof, in violation of the provisions of Rem. Code, § 2601, reading as follows:

"Every person who, with intent to deprive or defraud the owner thereof— . . . (3) Having any property in his possession, custody or control, as bailee, factor, pledgee, servant, attorney, agent, employee, trustee, . . . shall secrete, withhold or appropriate the same to his own use or to the use of any person other than the true owner or person

[1]Reported in 161 Pac. 1042.

entitled thereto; . . . steals such property and shall be guilty of larceny."

His trial in the superior court resulted in a verdict of guilty. Judgment was rendered thereon sentencing him to a term of not less than two nor more than fifteen years, from which he has appealed to this court.

The only contention here made in appellant's behalf is that the trial court erred to his prejudice in refusing to give to the jury the following requested instruction:

"The laws of the state of Washington provide that, in any prosecution for larceny, it shall be a sufficient defense that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though the claim is untenable.

"Therefore, if you find from the evidence that the defendant withheld or appropriated to his own use the property or money described in the information, that he did so openly and avowedly under a claim of title preferred in good faith, that is, honestly believing that he was legally entitled to it as his own, then your verdict should be not guilty."

It is argued that, in view of appellant's claimed good faith and honest belief that he was legally entitled to the money he was charged with appropriating, he was entitled to have this requested instruction given to the jury to the end that the jury might be advised as to the law touching the question of his good faith as provided by Rem. Code, § 2608, which reads:

"In any prosecution for larceny it shall be a sufficient defense that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though the claim be untenable."

At the time of the alleged commission of the offense, appellant was engaged in what he terms the "business chance brokerage business," and which he describes as "selling of businesses that different people list with us for sale." He testified as to the manner of procuring commission or com-

pensation for such services as follows: "They [the owners] generally add a commission on to the price that they want; they say they will take so much net for themselves, and whatever we make over we can keep." A day or two prior to the alleged commission of the offense, Mrs. Buttler, the prosecuting witness, went to appellant's office, where considerable talk was indulged in between her and appellant relative to her desire to purchase a cigar stand. She then made known to him that she desired to invest not to exceed $500 in such a business. At that time he did not have in mind any particular cigar stand that he regarded as one she would be likely to purchase, so they agreed that she should come back the next day when something more definite might be proposed. In the meantime, he procured to be listed with himself for sale a cigar stand at a net price of $490 to the owner. Upon her return to appellant's office the following day, she was told of this cigar stand, and was informed that she could probably buy it for $525, appellant having in mind the earning of his commission or compensation in stating this price to her. Finally, after some considerable protestation upon her part that she did not want to invest that much, and after appellant had taken her to see the property, a preliminary contract of purchase was signed by her, she paying $50 down thereon and agreeing to pay the balance upon final consummation of the deal and transfer of good title to her. Soon thereafter the title was transferred to her by bill of sale in pursuance of the preliminary contract, when she paid the balance of the purchase price, and in addition thereto, paid $5.85 which appellant informed her was the amount of the rent of the place for the balance of the ensuing month, the rent for the month having been paid in advance.

We shall assume, for argument's sake, that these payments were all made by Mrs. Buttler to appellant and that he thereafter settled with the owners. At the time of thus closing the deal, appellant, seeming to be of the opinion that he was

not making as much out of it as he should, said to Mrs. Buttler: "I am not making enough commission out of this deal, will you give me $25 more for my commission? It is optional with you whether you want to do it, if you don't, don't. I think I ought to have it because I am not making enough." After some hesitation, she paid him $25, though at that time she did not know how much he was getting out of the purchase price she had paid. Up to that time no conversation had passed between appellant and Mrs. Buttler touching his commission, and apparently she had no thought up to that time of paying any commission. It was at that time that he induced her to pay the $5.85 on account of the rent, which had been paid in advance and to which extent she would be benefited as the tenant of the place for the remainder of the month. So appellant thus got the $35 excess upon the purchase price Mrs. Buttler paid above the owners' net price and also the $5.85 paid by her on account of the rent. Appellant says that the owners had agreed with him that he should not only have the excess that he would get over their net price of $490, but should also have whatever amount he collected from the purchaser on account of rent, which would accrue to the benefit of the purchaser after a sale on account of the whole month's rent having been paid in advance.

There was given upon the trial a large amount of testimony tending to show that appellant had misrepresented to Mrs. Buttler the value of the property and the net price the owners were to receive for it, all of which, however, was denied by appellant. There was also considerable evidence pointing to the existence of the relation of principal and agent between appellant and Mrs. Buttler, from which it might well be argued that such relation did exist from the beginning of the negotiations. He testified, however, positively that he was not her agent at any time. While this, of course, was a conclusion to be drawn from the facts, it in any event tended

to show his belief as to his legal relation with her and has a bearing upon the question of his good faith touching his right to the money appropriated.

The argument of the prosecuting attorney deals at considerable length with the facts and circumstances disclosed by the evidence pointing to appellant's guilt, which argument it seems to us deals more with the question of appellant's guilt than with the question of his being entitled to have this instruction given to the jury. However, it is sought to draw the conclusion therefrom that the requested instruction has no application to the facts, and hence that its refusal was not prejudicial error. We are, however, not here concerned with the question of appellant's guilt or innocence. That was for the jury to decide. We are only concerned with the question of whether or not he was entitled, under the theory of his defense, to have the jury instructed as requested. Now it seems to us that to hold that the defendant was not entitled to this requested instruction would be in effect to hold, as a matter of law, that his defense of good faith was wholly unfounded. It may be that, looking at the evidence as a whole, such would be the fair conclusion of fact which the jury might be warranted in drawing, but that is quite a different matter from the court in effect so declaring, as a matter of law, by its refusal to give this instruction. Looking at the evidence as a whole, we cannot escape the conclusion that appellant's theory of defense, that is, that "the property was appropriated openly and avowedly under a claim of title preferred in good faith," has sufficient support in the evidence to call for the submission of appellant's claim in that regard to the jury. It is conceded that the requested instruction fairly states the law as provided in Rem. Code, § 2608, above quoted. It is not argued, and we think it could not be successfully argued, that the law as defined by that section was given to the jury in any of the instructions given by the court. It is easy to see that the

jury might have found in appellant's favor had it been instructed as requested.

The judgment is reversed, the appellant is granted a new trial and the cause remanded for further proceedings.

MOUNT and HOLCOMB, JJ., concur.

[No. 13564. Department Two. December 29, 1916.]

GROCETERIA STORES COMPANY, *Appellant*, v. M. C. TIBBETT, *Respondent*.[1]

TRADE-MARKS AND TRADE-NAMES — PERSONS ENTITLED — VENDORS. Under Rem. Code, § 9492, making it unlawful to counterfeit, imitate, or use any "label, trade-mark, . . . or form of advertisement" adopted and filed for registration as required by the act, for the purpose of designating any goods, "as having been made, manufactured, produced, packed, or put on sale" by another, a person not originating or manufacturing goods is entitled to trade-mark a name for goods packed and "put on sale" by him.

SAME—NAMES SUBJECT—"GROCETERIA." The term "Groceteria," applied to grocery stores operated without the use of clerks or deliveries, in which the purchaser makes his own selections, may be trade-marked under Rem. Code, § 9492, where it is admitted that the person claiming the right to the same was the first to use the word.

SAME—INFRINGEMENT. The use of the words "Pacific Groceteria" is an infringement of a trade-mark of "Groceteria No. 1"; since it is sufficiently similar to deceive persons of ordinary caution.

SAME—EXTENT OF PROPERTY—PLACE OF BUSINESS. A concern located at Seattle claiming a trade-mark of the name "Groceteria" registered under Rem. Code, § 9492, may maintain an action to enjoin the use of the name by another at Tacoma, where it is alleged in the complaint and admitted that plaintiff was doing business from its Seattle office with people in the city of Tacoma.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered May 13, 1916, upon sustaining a demurrer to the complaint, dismissing an action for an injunction. Reversed.

[1]Reported in 162 Pac. 54.

Edward Judd and *H. R. Harriman*, for appellant.

E. D. Hodge, for respondent.

HOLCOMB, J.—This action was brought by appellant, a corporation, for the purpose of restraining respondent from in any manner using the trade-mark or trade-name "Groceteria." The complaint alleges, that appellant has opened up several grocery stores in the city of Seattle which are designated as "Groceteria No. 1," "Groceteria No. 2," and "Groceteria No. 3"; that it has been selecting and procuring leasehold interests in the city of Tacoma preparatory to going into business in that city, and that it has been doing business from its Seattle office with people in the city of Tacoma; that appellant's stores are operated in such a manner that no deliveries are made to purchasers and no clerks employed, each purchaser making his selection and paying for the same on his exit, thus greatly reducing the operating expenses of the store and allowing appellant to sell groceries at a greatly reduced price, and that the trade-mark of appellant is marked upon the container in which the goods are sold; that appellant is the first person in the state of Washington to use the method of operating a grocery store as described above, and has used large sums of money to advertise the same; that it is the first person in the state of Washington to use the word "groceteria" as a trade-mark or trade-name, and that, on November 10, 1915, the secretary of state granted a certificate of registration of such trade-mark to appellant; that respondent, M. C. Tibbett, is engaged in conducting a grocery business in the city of Tacoma, and has placed on the windows of this store large signs containing the words "Pacific Groceteria," giving particular prominence to the word "groceteria"; that respondent is using the trade-mark and trade-name of appellant in order to convey to the public the idea that he is merchandising and trading in the goods of the plaintiff, and is attaching the

name and word "groceteria" to the goods sold in respondent's store. A demurrer to this complaint was sustained. As appellant elected to stand upon the complaint, a judgment of dismissal was entered, from which this appeal is taken.

In an attempt to justify the ruling of the trial court and also to distinguish the instant case from *Martell v. St. Francis Hotel Co.*, 51 Wash. 375, 98 Pac. 1116, respondent first claims that appellant had nothing to trade-mark. This claim is advanced by respondent on the theory that the word "trade-mark" is so restricted in its meaning that its only office is to point out distinctively the origin and ownership of a certain product or products to which it is affixed; in other words, to give notice who the producer was; and that, under this definition, no trade-mark could be acquired by a person who did not produce or manufacture the goods, but only displayed and sold the same, which is all, it is argued, appellant did in this case. Granting, for the sake of argument, that appellant would not be entitled at common law to trade-mark this word, it would nevertheless be entitled, under the facts here pleaded, to some relief; for even when, for any reason, a word is not capable of being trade-marked, still when, by reason of its original and long usage by the person attempting to acquire it for a trade-mark or a trade-name, it has acquired a secondary signification in reference to this use as a trade-name by such person, its use in this connection will be protected by restraining any use of the word or any infringement which would tend to deceive the public or those to whom the use of the word in its special meaning has become attached. *Elgin National Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537.

But by the terms of Rem. Code, § 9492, not only in a case of this character is appellant protected in the use of the word attempted to be trade-marked, by the restraint of others from using the word in a manner which tends to deceive the

public, but also it is the proper subject of a trade-mark. This statute reads as follows:

"Whenever any person, or any association or union of workingmen has heretofore adopted or used, or shall hereafter adopt or use, and has filed as hereinafter provided any label, trademark, term, design, device or form of advertisement for the purpose of designating, making known, or distinguishing any goods, wares, merchandise or other product of labor, as having been made, manufactured, produced, prepared, packed or put on sale by such person or association or union of workingmen or by a member or members of such association or union, it shall be unlawful to counterfeit or imitate such label, trademark, term, design, device or form of advertisement, or to use, sell, offer for sale, or in any way utter or circulate any counterfeit or imitation of any such label, trademark, term, design, device or form of advertisement."

There can be no doubt that, by the express terms of the statute, a person is entitled to a trade-mark and the protection afforded thereby, not only when he is the originator and manufacturer of the goods bearing the trade-mark, but also as a *label* when the goods are only packed and "put on sale" by such person, which was exactly what was done by appellant in this case, as all the goods sold by appellant were put in wrappers marked with the label "Groceteria" to distinguish the goods so sold by appellant.

Respondent's second assertion is based on the ground that the word "groceteria" is descriptive of the grocery business, and therefore is not such a word as could become the subject of a trade-mark. It would seem that the statute above quoted would be controlling here and answer this argument contrary to respondent's contention; but in any event, we think this argument without merit, since neither the word "groceteria," nor any syllable, nor any successive syllables thereof, constitutes any word in the English language, and it is admitted that appellant was the first to use this word. It is, therefore, a fictitious or fanciful and original name and appropriate for a trade-mark label, so far as this contention is concerned, and

respondent has pirated that word. Paul, Trade-Marks, § 49; Sebastian, Trade Marks, pp. 55-64.

Respondent's argument that "Pacific Groceteria" is not an infringement of appellant's alleged trade-mark "Groceteria No. 1," etc., because these terms are not identical, is completely answered in *Rosenburg v. Fremont Undertaking Co.*, 63 Wash. 52, 114 Pac. 886, wherein this court said:

"Nor need one trade-name, in order to be an infringement upon another, be exactly like it in form and sound. It is enough if the one so far resembles the other as to deceive persons of ordinary caution into the belief that they are dealing with the one concern when they use the name of the other."

Relying on the rule announced in *Eastern Outfitting Co. v. Manheim*, 59 Wash. 428, 110 Pac. 23, 35 L. R. A. (N. S.) 251, respondent asserts that, as appellant has established no place of business in the city of Tacoma and has done no business there, it is not entitled to the exclusive use of the word "groceteria" in that community. It is true in *Eastern Outfitting Co. v. Manheim* we held that the fact to be ascertained was, What is the market of the complaining party? and his protection in the use of his trade-name is coextensive with his market. The court then found that the plaintiff's place of business was in Seattle, and it was doing no business whatever in Spokane, and was therefore not entitled to the use of the trade-name in Spokane as against defendant who had, at a large expense, established a business in Spokane. The rule as laid down in the *Eastern Outfitting Co.* case, *supra*, in any event, is not applicable here, as it is alleged in the complaint and admitted by the demurrer that appellant is doing business with the people of Tacoma, which makes Tacoma a part of its market.

It is not here intended to enjoin and prohibit the method of doing business pursued by respondent, but only the piratical use of the trade-name or trade-mark and label "groceteria" within the state.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent herewith.

Morris, C. J., Mount, Parker, and Fullerton, JJ., concur.

[No. 13590. Department One. December 29, 1916.]

William Biel *et al.*, *Appellants*, v. R. B. Tolsma, *as R. B. Tolsma & Company, Respondent.*[1]

Fraud—Seller's Praise—Instructions. In an action for fraud in the sale of an automobile which was at hand and examined by the purchaser, it is proper to instruct that the seller has a right to exalt the value of his property to the highest point the purchaser's credulity will bear, and boastful assertions and exaggerated description do not amount to fraud.

Same. In such an action, it is a proper test of actionable fraud that the representations complained of must be calculated to deceive a person acting with reasonable and ordinary prudence.

Same—Statements as to Value—Instructions. In such an action, it is proper to instruct that a person may not rely upon mere opinions as to the value of the property, and must use that degree of caution and diligence in ascertaining the conditions of the property which an ordinarily prudent man would exercise under like circumstances.

Appeal from a judgment of the superior court for King county, Jurey, J., entered May 11, 1916, upon the verdict of a jury rendered in favor of the defendant, in an action for fraud. Affirmed.

William Wray, for appellants.

Van Dyke & Thomas, for respondent.

Holcomb, J.—On February 23, 1915, appellants purchased from respondent a certain Pope-Hartford automobile. Appellants sued to recover damages in the sum of $1,100, representing the sum paid for the car, upon allegations of fraud and deceit by way of false representations regarding

[1]Reported in 161 Pac. 1047.

the condition, price paid, and value of the car. The allegations of fraud and misrepresentation being denied by respondent and the cause tried to a jury, a verdict was found for respondent.

As ground for reversal, appellants urge that the instructions upon the issue of fraud given by the court were erroneous. The instructions, which for convenience we have numbered consecutively, were as follows:

"(1) Fraud is never presumed, but must be proved. The law presumes that every person transacts business honestly and in good faith, and the burden of proving fraud is on the party who alleges fraud. In this case the burden of proving fraud is on the plaintiffs.

"(2) Fraud is never to be imputed where the transaction may be fairly reconciled with honesty, and if the weight of evidence is in favor of that conclusion it should always be adopted.

"(3) You are instructed that when a party, capable of taking care of his own interests makes a bad or losing bargain, the law will not assist him, unless deceit has been practiced, against which ordinary care could not protect him.

"(4) You are instructed that when parties are negotiating a sale and purchase for property which there is an opportunity for examining, a party has a right to exalt the value of his own property to the highest point the purchaser's credulity will bear. Such boastful assertions and exaggerated descriptions do not amount to fraudulent misrepresentation or deceit. In such case, the parties are upon equal ground, and their own judgment must be their guide in coming to conclusions.

"(5) You are instructed that every false affirmation does not amount to a fraud. If, by an ordinary degree of caution the party complaining could have ascertained the falsity of the representations complained of, then such party is not entitled to a verdict; and in this case, to entitle the parties to a verdict, you must believe, from the evidence, not only that the representations complained of were made, but also that they were made under circumstances calculated to deceive a person acting with reasonable and ordinary prudence and caution; and in determining this question, the jury should consider all the circumstances under which the alleged repre-

sentations appear, from the evidence, to have been made, and further under the circumstances the representations were such as a person of common and ordinary prudence would or should have relied upon, or such as would be likely to mislead such a person.

"(6) The jury are instructed that when one person states to another his opinion as to the value of any property merely as his opinion, not as a fact that he knows to be true, then the person to whom such opinion is stated in this manner has no right to rely upon such opinion, but must exercise his own judgment.

"(7) You are instructed that the law imposes upon one purchasing personal property that degree of caution and diligence in ascertaining the conditions of the property and all matters pertaining thereto, which are visible or which an ordinarily prudent man, in the exercise of ordinary prudence and caution would exercise under like circumstances would ascertain, and as to all such matters the law charges the purchaser with constructive notice of such facts only as by the exercise of such caution and diligence he would probably have discovered."

What the fault of the first three paragraphs of instructions is we are unable to understand. They certainly state the law correctly as well settled, both here and generally, and were fairly pertinent to the issues and evidence. The third paragraph is criticized as being in the face of our holdings in *Raser v. Moomaw*, 78 Wash. 653, 139 Pac. 622, 51 L. R. A. (N. S.) 707; *Agnew v. Hackett*, 80 Wash. 236, 141 Pac. 319, and *Rochfort v. Quikstad*, 90 Wash. 432, 156 Pac. 522. The first and third of the above cases were decisions merely upon the sufficiency of pleadings alleging fraud and deceit to raise such issues of fact. In this case the pleadings were considered sufficient and issue of fact joined, and the facts were for the jury. In the *Agnew* case above cited, the instructions complained of and which were there sustained were not similar to those here assailed. We have never held, and indeed no reputable court has held, that in dealing for property, real or personal, when the property was at hand and the means of ascertaining its condition, its correspondence

with the representations made concerning it by the seller, and its value, reasonably ascertainable, that a buyer could shut his eyes thereto, and blindly and recklessly rely upon any and all opinions or representations made concerning it by the seller. To establish such a rule would be to place a premium upon carelessness and indifference. *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613; *Pigott v. Graham*, 48 Wash. 348, 93 Pac. 435, 14 L. R. A. (N. S.) 1176; *Stewart v. Larkin*, 74 Wash. 681, 134 Pac. 186, L. R. A. 1916B 1069; *Parker v. Brainard*, 91 Wash. 428, 157 Pac. 1078; Brickwood's Sackett, Instructions, § 1102.

The same proposition, in effect, is involved in the fourth paragraph of instructions. It follows the principle well stated in 2 Cooley on Torts (3d ed.), 921.

The fifth paragraph gives the jury the test for determining actionable fraud and deceit from the facts. It is exactly reproduced from 1 Brickwood's Sackett's Instructions, § 1100, as an approved instruction upon such matter, and approved in *Eames v. Morgan*, 37 Ill. 260; *Antle v. Sexton*, 137 Ill. 410, 27 N. E. 691, and *Commercial Nat. Bank v. Pirie*, 82 Fed. 799. We think it fair, and no contrary cases are called to our attention.

The sixth and seventh paragraphs deal with expressed opinions as to value, in accord with the rule stated in 2 Cooley, Torts, p. 920, and with the same matters dealt with in the third and fifth paragraphs. We see no fault in them.

The record shows that there were no relations of confidence and trust existing between the parties. The subject of the sale was at hand and was examined and reexamined. There was some conflict in the evidence. The jury were properly instructed and resolved the facts in favor of defendant.

The judgment must be affirmed, and it is so ordered.

MORRIS, C. J., MAIN, ELLIS, and CHADWICK, JJ., concur.

[No. 13601. Department One. December 29, 1916.]

CORNELIA BYAM, *Respondent*, v. LON ALBRIGHT *et al.*, *Appellants*.[1]

HOMESTEAD—RESIDENCE—STATUTE—CONSTRUCTION. Where a husband and wife, for a year or more prior to the filing of a declaration of homestead, actually made their home upon the land, although the husband was absent considerable of the time on business, their homestead right was perfected, under Rem. Code, § 552, providing that the homestead must "be actually intended and used for a home for the claimants," as that has reference only to the qualifications at the time of the filing.

SAME—"ABANDONMENT"—REMOVAL FROM STATE—STATUTES—CONSTRUCTION. A homestead right, duly perfected by husband and wife residing on the land, is not abandoned by the subsequent removal of the claimants from the state, in view of Rem. Code, § 535, providing that a homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged by the husband and wife, and Id., § 536, providing that a declaration of abandonment shall be effectual only from the time it is filed, and Id., § 561, providing that the homestead shall descend to heirs or devisees and shall in no case be liable for the debts of the owner except as provided in the act.

SAME. Rem. Code, § 571, providing that nothing in this *chapter* shall be construed to exempt from attachment or execution the property of nonresidents, applies only to the Code of 1881, and not to the subsequent act of 1895; and hence does not prevent persons removing from the state from claiming homestead rights in lands acquired under the act of 1895.

SAME — SALE UNDER EXECUTION — "NECESSARIES." Under Rem. Code, § 564, providing that no property shall be exempt from execution for actual necessities, not exceeding $50 in value furnished within sixty days, an execution sale of a homestead upon a judgment for $645 is not validated by the fact that $32.79 of the sum received was for necessities furnished within the time limited, there being no allegation in the complaint that part was for necessities.

Appeal from a judgment of the superior court for Mason county, Mitchell, J., entered February 8, 1916, upon findings in favor of the plaintiff, in an action to quiet title, tried to the court. Affirmed.

[1]Reported in 162 Pac. 10.

Troy & Sturdevant, *A. J. Falknor*, and *Bigelow & Manier*, for appellants.

Tom Alderson, for respondent.

PARKER, J. — The plaintiff, Cornelia Byam, commenced this action in the superior court for Mason county seeking a decree quieting her title to a forty-acre tract of land in that county which she claims as her separate property and her homestead. The defendants Lon Albright and Dora W. Troutman claim interest in the land under an execution sale. C. P. Byam, the plaintiff's husband, was made a defendant to the end that her title might be quieted as against any community claim he might make to the land. Trial upon the merits resulted in findings and decree in favor of the plaintiff as prayed for, from which the defendants Albright and Troutman have appealed.

At all times since prior to the year 1912, respondent and defendant C. P. Byam were, and now are, husband and wife. In January of that year a Mrs. Adams conveyed to respondent the land in question, which conveyance was, as claimed by respondent, in consideration of money paid by her son, who caused the conveyance to be so made as a gift to her from him. The trial court found that the land was so acquired by respondent as a gift from her son, and concluded that it thereby became her separate property. In July, 1912, respondent duly executed and filed for record in the office of the auditor of Mason county her declaration claiming the land as a homestead, her husband never having filed any declaration of homestead. The value of the land and improvements thereon has at no time exceeded the sum of $2,000.

In the spring of 1912, the community consisting of respondent and defendant C. P. Byam had become indebted to appellant Albright in the sum of $645, for the recovery of which he commenced an action in the superior court for Mason county in April of that year. In May, 1913, judgment was rendered in that action for the amount claimed.

Looking alone to the language of that judgment, there is ground for arguing that it was a judgment against respondent individually as well as against the community and C. P. Byam, though considering it in the light of the allegations of the complaint in that action, there is room for argument to the contrary. For argument's sake, we shall proceed upon the assumption that the land in question became subject to the satisfaction of that judgment, unless exempt therefrom because of respondent's declaration and claim of homestead. This will render it unnecessary for us to further notice the questions of the judgment being rendered against respondent individually and the land being her separate property, as to which contentions are made in appellants' behalf. Execution being issued upon that judgment, the land was sold in pursuance thereof by the sheriff of Mason county in August, 1913, and no redemption thereof being made, the sheriff executed his deed therefor in August, 1914, to appellant Dora W. Troutman, who was the purchaser at the sale.

The contention of appellants here to be considered is that respondent lost her homestead right in the land by abandonment, consisting of her and her husband's removal from the land and from the state of Washington and taking up their residence in the state of Oklahoma before its sale in pursuance of the execution. Touching the question of the residence of respondent and her husband, the trial court found, in substance, that they resided and made their home thereon intending to make that their home in the future, though they absented themselves therefrom and from the state for a period of nearly two years after the filing of the homestead declaration. It is insisted that the evidence calls for findings to the effect that respondent and her husband did abandon their residence upon the land and acquire a residence in the state of Oklahoma before its sale under the execution, from which it is argued that respondent thereby lost her homestead right and rendered the land subject to sale under the execution in

satisfaction of the judgment rendered in favor of appellant Albright.

A painstaking review of the evidence leads us to the conviction that, for a year or more prior to the filing of the homestead declaration by respondent, she and her husband had been, and were then, actually making their home upon the land, and that they then intended to continue their home thereon. It is true her husband had been away a considerable portion of that period, but his absence was caused by his business taking him to several different places in the middle western states and did not result in his acquiring a home in any other place. To this extent, at least, we agree with the findings of fact made by the trial court touching the question of their residence and home upon the land. It is plain that such residence complied with Rem. Code, § 552, which provides that "the homestead must be actually intended and used for a home for the claimants." This provision, as was held in *Wentworth v. McDonald*, 78 Wash. 546, 139 Pac. 503, has reference only to the qualifications of a claimant to assert his homestead right at the time of filing his homestead declaration, and not to the continuing of such right thereafter. We conclude, therefore, that respondent was then entitled to, and did, perfect her homestead right to the land by the filing of her declaration.

Now, whether or not the land thereafter ceased to remain exempt as a homestead because of the abandonment by respondent and her husband of their residence thereon by removal therefrom to another state, assuming for argument's sake such to be the fact, is quite another question. This question, we think, must also be answered in respondent's favor. We prefer, however, to rest this answer upon the provisions of the homestead statute limiting the manner of abandoning homesteads, rather than upon the somewhat unsatisfactory ground, in the light of the evidence, that respondent and her husband retained their residence upon the land, as found by the trial court. Proceeding upon the theory that respondent

and her husband became nonresidents of the state after the filing of the declaration, counsel for appellants invoke the general rule that a homestead right is abandoned and the property ceases to be exempt by the removal of the claimant therefrom, especially by removal from the state. Many decisions of the courts are called to our attention so holding. These decisions, however, deal with statutes making continued residence upon the homestead after its acquisition necessary to the continuing exemption right of the claimant, or with statutes which directly or by plain inference limit the continuance of all exemption rights of the claimant to the time of the claimant's residence within the state. None of them deal with the continuing exemption right of the claimant under a statute like ours, which not only prescribes an exclusive manner of selecting the homestead and evidencing such selection by public record, but also in express terms prescribes an exclusive manner of abandoning the homestead and the exemption right therein. Our present law defining and exempting the homestead is an act complete within itself. Laws of 1895, pp. 109-114 (Rem. Code, §§ 528-561); *Wentworth v. McDonald*, 78 Wash. 546, 139 Pac. 503. Touching the questions of the commencement and termination of the homestead right, we find in that act the following:

"A homestead can be abandoned *only* by a declaration of abandonment, or a grant thereof, executed and acknowledged, —(1) By the husband and wife if the claimant is married; . . ." Laws of 1895, p. 110, § 7; Rem. Code, § 535.

"A declaration of abandonment is effectual *only* from the time it is filed in the office in which the homestead was recorded." Laws 1895, p. 110, § 8; Rem. Code, § 536.

"From and after the time the declaration is filed for record the premises therein described constitute a homestead. If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this act [chapter]; in other cases, upon the death of the

person whose property was selected as a homestead, *it shall go to his heirs or devisees*, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; *but in no case shall it be held liable for the debts of the owner, except as provided in this act* [*chapter*]." Laws 1895, p. 114, § 33; Rem. Code, § 561.

The words "act" in the original act are changed to "chapter" in Rem. Code and also in Rem. & Bal. Code. We have italicized the words of these provisions to which we direct particular attention. We have here prescribed not only an exclusive method by which a homestead may be abandoned without reference to the residence of the claimant, but also express provisions rendering it as completely exempt from debts of the homestead claimant after his death as before his death, though it pass to nonresident heirs or devisees. It would seem useless to argue, in the face of these plain provisions, that because, under certain circumstances, they thus give nonresidents the benefits of this exemption, the statute should be construed as being of no force when nonresidents are seeking its protection. Of course, the courts cannot consider such an argument when the statute is plain and free from ambiguity, as this one is. To so construe this statute would be reading into it that which we think cannot be found therein, either in terms or by implication.

Sections 7 and 8 of the act of 1895 (Rem. Code, §§ 535, 536), above quoted, are the same as, and seem to be borrowed from, the California statute, which was construed by the supreme court of that state long before their enactment in this state, in *Porter v. Chapman*, 65 Cal. 365, 4 Pac. 237. In that case, the claimants had mortgaged their homestead in California and moved to the territory of Arizona, the husband becoming a citizen and voter of that territory. Holding that the homestead exemption right acquired in California was not lost by such removal therefrom to the territory of Arizona, the court said:

"The homestead regularly declared to be such was not abandoned by the removal of the husband Porter from the

premises and residing with his family elsewhere in the state, or by his removal from the state to the territory of Arizona with his family when employed to go there by Clark, and remaining in such employment since April, 1877, becoming a citizen of the territory, voting in its elections, and offering himself as a candidate for office therein. It is found that when Porter and wife removed from their homestead, they did not intend to relinquish or abandon it, but intended to return thereto and make it their home, and that Mrs. Porter accompanied her husband to Arizona, because she believed it was her duty to do so, and with no intention to relinquish her residence in this state, understanding that her absence was only to be temporary, and during all the time she lived in the territory she claimed to be a resident of California, to have her homestead in Suisun, and intended to return thereto and occupy it as a home.

"The removal and residence above mentioned were not an abandonment. (See § 2, Act 1851, as amended in 1862; Stats. 1862, p. 519; and Civ. Code, §§ 1243, 1244.) Nor was it abandoned by the mortgage to Reeves by husband and wife, as security for money, and a reconveyance by Reeves to the husband, when the debt secured was paid Reeves by him. Under our law we know of no abandonment of the homestead except in the statutory mode. The homestead having once been regularly created out of a parcel of land, in accordance with the statute, the estate so created continues to exist until put an end to in the mode pointed out by the statute. The grounds of abandonment urged are not within those fixed and recognized by the statute. In our decisions in regard to homesteads, we are bound to follow the statutes on the subject. If hard cases should arise, a provision for avoiding them must be by an alteration of the law by the legislative department of the government. The courts are in this regard without power."

While the California court here recognized the intent of the claimants to return at some time to their homestead in California, that evidently was not viewed as controlling, as evidenced by the same court's decision in *Tipton v. Martin*, 71 Cal. 325, 12 Pac. 244, where there was presented a case of claimants removing from their homestead in California to the territory of Montana with the intention of permanently

residing there, and where they had taken initiatory steps looking to the acquisition of a United States government homestead, which, of course, required a claim of residence thereon in the territory of Montana. Justice McKee, speaking for the court, after noticing that homesteads which rest wholly upon occupancy after acquisition are abandoned by removal therefrom, said:

"'A homestead,' says the code, which embodies the statutory provisions of the homestead laws of 1860 and 1862 upon the subject, 'can be abandoned *only* by a declaration of abandonment, or a grant thereof, executed and acknowledged by the husband and wife, if the claimants are married, or by the claimant if unmarried'; and the abandonment is effectual *only* from the time it is recorded. (Civ. Code, §§ 1243, 1244.) Abandonment of a homestead cannot be proved in any other way. As we have said, 'the homestead having once been regularly created out of a parcel of land, in accordance with the statute, the estate so created continues to exist until put an end to in the mode pointed out by the statute. . . . Under our law, we know of no abandonment of the homestead except in the statutory mode.' (*Porter v. Chapman*, 65 Cal. 365.)"

There has not come to our attention any statute like our own, except that of California. The statutes of all the other states apparently proceed upon the theory that the continuance of the homestead exemption right, after it is once established, depends upon continued residence thereon, or, in any event, upon continued residence within the state of such nature as to constitute constructive residence thereon.

Counsel for appellants argue that the holding of these California cases is not applicable here because we have in our exemption statutes the following provision in Rem. Code, § 571:

"Nothing in this *chapter* shall be construed to exempt from attachment or execution the property, *real* or personal *of nonresidents*, . . ."

We italicize the words to be particularly noticed. This provision, it is true, is found both in Rem. & Bal. Code and

in Rem. Code in the same chapter with the homestead provisions of the act of 1895, above noticed. However, reference to the history of this section, readily found from the citations thereunder in these compilations of our statutes, will readily show that it constitutes no part of the homestead act of 1895, but was enacted years before. It was § 348 of chapter 32 of the Code of 1881 relating to general exemptions, including the exemptions of the homestead as therein defined. That was only a possessory homestead, the continuing right to which depended upon continuing residence of the claimant thereon. That homestead law was superseded by the present law of 1895, containing exemption provisions as follows:

"The homestead is exempt from execution or forced sale, except as in this act [chapter] provided." Laws 1895, p. 109, § 4; Rem. Code, § 532.

The word "act" in the original act is changed to "chapter" in Rem. Code and also in Rem. & Bal. Code.

"The homestead is subject to execution or forced sale in satisfaction of judgments obtained: (1) On debts secured by mechanic's, laborer's, materialmen's or vendor's liens upon the premises. (2) On debts secured by mortgages on the premises executed and acknowledged by the husband and wife or by any unmarried claimant." Laws 1895, p. 110, § 5; Rem. Code, § 533.

These are the only exceptions to the exemption of the homestead prescribed by the act of 1895, and the judgment under which this sale was made was not for any of the debts mentioned in those exceptions. It is plain, then, that the words "*chapter*" and "*nonresidents*," appearing in the above-quoted portion of Rem. Code, § 571, do not have any reference to the homestead as defined by the act of 1895, or the exemption thereof as therein prescribed.

The decisions of this court in *Lewis v. Mauerman*, 35 Wash. 156, 76 Pac. 737, and *Wentworth v. McDonald*, 78 Wash. 546, 139 Pac. 503, lend support to the view that, un-

der the homestead act of 1895, the removal of a claimant from his homestead, even beyond the limits of the state, does not put an end to his exemption right therein. Those cases, it is true, do not deal with the removal of claimants beyond the limits of the state, but they do settle the rule that continued residence upon the homestead after it has once been lawfully established is not necessary to the continuing exemption right of the claimant. The only decision of this court which can be considered as at all lending support to the contrary view is that of *Gullickson v. Fenlon*, 48 Wash. 503, 93 Pac. 1074. In that case it appeared that the claimants moved from their land away from the state, disposing of their personal property with intent to defraud their creditors, before they had filed any homestead declaration upon the land. A judgment being rendered against them thereafter, jurisdiction having been acquired by attachment of the land, they returned to the land and filed a declaration claiming it as a homestead, with a view of defeating its sale in satisfaction of the judgment. The court found that their return to the land was not in good faith with the intention of making a home thereon, but merely a subterfuge to defeat its sale in satisfaction of the judgment. That, manifestly, was not a case involving an abandonment of a homestead right after it had once been lawfully established, but one involving the claimants' right to acquire a homestead when they were not intending to use the land for a home as required by Rem. Code, § 552. The question was not one of abandonment, but of the acquisition of a homestead. It is true that the provision of Rem. Code, § 571, above quoted, was noticed by the court in that case, it being there referred to as Bal. Code, § 5254, and apparently assumed to be a part of the homestead act of 1895. This assumption, as we have seen, was manifestly erroneous. However, a consideration of that section was not necessary to the determination of the rights of the parties in that case, in view of the finding that the claimants were not going upon the land in good faith with the in-

tention of making it their home. Manifestly it never became a lawfully established homestead. We think that decision is not controlling here.

Counsel for appellants invoke the provision of Rem. Code, § 564, reading as follows:

"No property shall be exempt from execution for . . . actual necessaries, not exceeding fifty dollars in value or amount furnished to the defendant or his family within sixty days preceding the beginning of an action to recover therefor, . . ."

Here, again, we have a provision which was enacted apart from the homestead law of 1895. But since it was enacted after this homestead law (Laws of 1897, p. 93; Laws of 1903, p. 135), we shall assume, without deciding, that it constitutes an exception to the homestead exemption as well as others. It appears in this case that the sum of $32.79 of the $645 recovered in the judgment in favor of appellant Albright under which the sale of the homestead was made, was the purchase price of goods which might be considered as actual necessaries sold less than sixty days preceding the commencement of that action. It is argued that, to this extent, in any event, the judgment was such as to render the homestead subject to its satisfaction. It was not alleged in the complaint in that action that these goods were necessaries, and the judgment is silent on the question. Evidently the case was not brought or prosecuted upon that theory; besides, the sale was made to satisfy the whole judgment, which in amount was many times more than the purchase price of these alleged necessaries. It seems plain to us that, whatever appellants' right may be touching the purchase price of these alleged necessaries as against respondent's homestead, it cannot be said that such rights have the effect of validating the execution sale here in question.

It is thoroughly settled by our decisions that a sale under execution of an exempted homestead, as we have seen this sale was, is not only voidable but absolutely void, and that

the confirmation by the court of a void sale does not render it valid. *Asher v. Sekofsky*, 10 Wash. 379, 38 Pac. 1133; *Harding v. Atlantic Trust Co.*, 26 Wash. 536, 67 Pac. 222; *Whitworth v. McKee*, 32 Wash. 83, 72 Pac. 1046; *Vietzen v. Otis*, 46 Wash. 402, 90 Pac. 264; *McLiesh v. Ball*, 58 Wash. 690, 109 Pac. 209, 137 Am. St. 1087.

We conclude that the judgment of the trial court must be affirmed. It is so ordered.

MORRIS, C. J., MAIN, CHADWICK, and ELLIS, JJ., concur.

[No. 13602. Department One. December 29, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v. TATSUO TAKANO, *Appellant*.[1]

EVIDENCE—JUDICIAL NOTICE. The courts will take judicial notice that "wood alcohol" is a poison.

HOMICIDE—SELLING POISON WITHOUT LABEL—INFORMATION. An information charging the accused with producing death through the sale of "wood alcohol" to be used as a beverage is sufficient without charging that it is a poison or that the accused knew it would produce death if drunk; especially in view of Rem. Code, § 2508, prohibiting the sale of any "preparation which according to standard works on medicine or *materia medica* is liable to be destructive to adult human life" unless it is labeled as a poison.

SAME—MANSLAUGHTER—INTENT. The act of selling unbranded poison, from which death results is manslaughter, although without intent to take human life, under Rem. Code, §§ 2392 to 2394.

CRIMINAL LAW—APPEAL—HARMLESS ERROR. One convicted of manslaughter through the sale of unbranded poison cannot move in arrest of judgment on the ground that he was guilty of murder in having sold it knowing that the deceased would drink it without knowledge of its poisonous quality.

HOMICIDE — SELLING POISONS — "WOOD ALCOHOL." Wood alcohol cannot be said to be not intoxicating, where it appears that the preliminary symptoms resemble those observed after an excessive dose of alcohol, although more marked.

[1]Reported in 162 Pac. 35.

CRIMINAL LAW—DEGREES OF OFFENSE—HARMLESS ERROR—INSTRUCTIONS. In a prosecution for manslaughter through the selling of unbranded poison, in violation of Rem. Code, § 2507, it is not prejudicial error to instruct that one violating the act would be guilty of a misdemeanor.

Appeal from a judgment of the superior court for King county, Frater, J., entered February 19, 1916, upon a trial and conviction of manslaughter. Affirmed.

Peterson & Macbride, for appellant.

Alfred H. Lundin and *Frank P. Helsell*, for respondent.

CHADWICK, J.—Appellant was charged with the crime of manslaughter, under an information the material parts of which follow:

"He, said Tatsuo Takano, in the county of King, state of Washington, on the 7th day of January, 1916, then and there being a druggist and pharmacist lawfully authorized by the state board of pharmacy of the state of Washington, to practice pharmacy and to fill prescriptions, in response to a request and demand from one Tom Shannon for bottles of alcohol for use as a beverage, did then and there wilfully, unlawfully, knowingly and feloniously sell and deliver to said Tom Shannon unlabeled bottles of intoxicating liquid containing wood alcohol, the exact number of which is to the prosecuting attorney unknown, with the intent that said Tom Shannon should drink the said liquid as a beverage, and therefore, to wit: on said 7th day of January, 1916, the said Tom Shannon did drink of said liquid contained in said bottles, and by reason of drinking said liquid did, on the 8th day of January, 1916, die."

To this information, appellant demurred, and later moved in arrest of judgment.

The first position assumed by appellant is that no crime is charged, for, assuming that wood alcohol is an intoxicating liquid, and that a quantity of it was sold to Shannon to be drunk as a beverage, the information charges no more than it would charge if it were alleged that ordinary grain alcohol had been sold in an unlabeled bottle to be drunk as a bever-

age, which is no more than a misdemeanor, and upon which the charge of manslaughter could not be predicated. This contention rests upon the theory that it is nowhere alleged that wood alcohol is a poison, or that appellant knew it would produce death if drunk.

To hold the information good, we must hold that the use of the words "wood alcohol" is legally equivalent to the use of the word "poison"; that is, read the information as if it charged in words, "did then and there, etc. . . . sell and deliver to said Tom Shannon unlabeled bottles of intoxicating liquid containing poison, etc."; or, if it be put in another way, we must take judicial notice of the fact that wood alcohol is a poison. That we may do so, seems logically referable to two principles, one resting in the common law rules of construction, the other in the statutes of the state. Courts, from ancient times, have taken judicial notice of the qualities and properties of matter. While wood alcohol is an article which has come into general commercial use only in recent years, its poisonous and dangerous character is well known; it is within the common knowledge of men. Judicial notice of a fact is not rejected for the want of elapsed time, but only because a court cannot say that the fact has come to be so generally known as to be within the general range of human knowledge or understanding. The properties of many articles of comparatively recent use in the commercial world have been judicially noticed by the courts.

Without resorting to or assembling the cases, we have found, for instance, that the courts have held judicially that gasoline and dynamite are dangerous and explosive. The general use of such articles gives them a known character without reference to the time of their use. Nor is it necessary that we know from experience or demonstration that wood alcohol is a poison that will produce death, if the world knows generally that it contains properties that will do so in the event of its use.

"Where words have a settled, uniform and known meaning, and are universally understood as importing certain species or qualities, there is no rule of pleading that requires an averment that they belong to their appropriate genus or possess their appropriate qualities. The words 'Paris green' in and of themselves import that 'Paris green' is a poisonous substance, the same as the words rum, gin or brandy import that they are spirituous liquors." *State v. Labounty*, 63 Vt. 374, 21 Atl. 730.

But if there be any doubt of our right to notice wood alcohol *eo nomine* as a poison, that doubt would seem to be removed by reference to the statutes. Rem. Code, § 2508, provides:

"It shall be unlawful for any person to sell at retail or furnish any of the poisons named in the schedules hereinafter set forth, without affixing or causing to be affixed to the bottle, box, vessel or package, a label containing the name of the article and the word 'poison' distinctly shown, with the name and place of business of the seller, all printed in red ink, together with the name of such poison printed or written thereon in plain, legible characters, which schedules are as follows, to wit:"

Schedule "B," after enumerating certain poisons, proceeds, "or preparation, which, according to standard works on medicine or materia medica, is liable to be destructive to adult human life, etc.," indicating to our minds, when considered in connection with Id., § 2507, under which the charge is laid, an intent on the part of the legislature that those who dispense poisons under the law, as well as the courts, should take notice of the properties of all preparations in common use that are dangerous to human life.

We are, therefore, of opinion that the information is sufficient to charge appellant with substituting an article different from that ordered, with no notice to the vendee of its dangerous quality.

Whether the act of selling unbranded poison be regarded as lawful or unlawful, it is manslaughter under the statute,

for it matters not whether the death result from the performance of a lawful act negligently performed, or an unlawful act without specific intent to take human life. Rem. Code, §§ 2392, 2393, 2394.

Counsel contends that if appellant sold the alcohol knowing that Shannon would drink it without knowing its poisonous quality, and that it would kill him if he did, appellant would be guilty of murder in the first degree. But it seems to us that appellant cannot complain that he might have been prosecuted for murder. We would be put to the anomaly of arresting judgment upon a plea that the accused had committed the same offense, a crime, but not in the manner and form as alleged, when, if his theory be true, that the information is sufficient to charge murder, he could plead *autrefois acquit*.

Certain errors growing out of the instructions are assigned. Those not covered by what we have said may be summarized: That Tom Shannon, the deceased, did not know the character of the liquid sold to him; that if it be true that the bottle contained an intoxicating liquid, then it could not have been wood alcohol, for the court will take judicial notice that wood alcohol is not intoxicating.

It is not material that the deceased should know that wood alcohol would cause his death. The essence of the crime charged is the putting of a destructive agent in the hands of one who may, and who does, use it. Ignorance or carelessness of the deceased is never a defense in cases of involuntary manslaughter. The design of the drug statutes is to protect the ignorant and unwary. If, on the other hand, deceased knew the poisonous quality of the article purchased, and intended suicide, as suggested by counsel, it would be a matter of defense. It is not essential that an information or an indictment should anticipate or negative every possible defense. Nor can we judicially notice that wood alcohol is not intoxicating. While admitting that "it

is not possible to give many details concerning the general symptoms" of methyl alcoholic poisoning, Peterson & Haines, in their work on Legal Medicine and Toxicology, vol. 2, p. 535, find that: "In some cases there has been a condition of exhilaration and excitement closely similar to that caused by ethyl-alcohol."

"After the ingestion of poisonous doses of wood alcohol, the preliminary symptoms resemble those observed after an excessive dose of alcohol, such as an exhilaration followed by hebetude and narcosis; but the severe headache, nausea, violent and persistent vomiting, are more marked." 2 Wharton & Stille, Medical Jurisprudence (5th ed.), § 482.

With the opinion of such inquirers before us, we would not assume to say, as a matter of law, that wood alcohol is not intoxicating.

Finally, it is insisted that, in defining the crime—the unlawful act out of which the evil consequence now complained of grew—the court told the jury that any one guilty of violating § 2507 would be guilty of a misdemeanor, and thereafter refused to submit verdicts other than "guilty as charged" and "not guilty" to the jury. The definition of an unlawful act, or a lawful act carelessly and negligently done, was necessary as preliminary to the direction of the jury when considering the charge of involuntary manslaughter. The use of the words "shall be guilty of a misdemeanor" were not necessary, but they are certainly not prejudicial.

We have sustained the information before us, and, as it may seem, not without some labor, but it should not be understood that we commend it as a model of excellence or to be followed as a form. We feel justified, too, in saying that, with the general commercial use of wood alcohol, the use of the name "alcohol" by those who deal in the commodity, as a word descriptive of menthylated spirits, should be prohibited. The trade, in more than one instance, has under-

taken to do so, but without success. It should be made an offense by act of the legislature.

Affirmed.

MORRIS, C. J., MAIN, MOUNT, and ELLIS, JJ., concur.

[No. 13606. Department One. December 29, 1916.]

THE STRATFORD, INCORPORATED, *Respondent*, v. SEATTLE BREWING & MALTING COMPANY *et al.*, *Appellants*.[1]

LANDLORD AND TENANT—LEASE—MODIFICATION. Where a lease stipulated that the premises were not to be used for any other purposes than that of a saloon, a subsequent modification permitting a sublease of a portion of the premises for a restaurant, cigar, and bootblack business, does not change the principal purpose of the lease.

SAME—LEASE—"SALOON." A lease of premises for a "saloon business" necessarily contemplates the business of selling intoxicating liquors.

SAME—LEASE—TERMINATION—EFFECT OF PROHIBITION LAW ON "SALOON" LEASE. The prohibition law, Rem. Code, § 6262-5, making it illegal after January 1, 1916, to lease or permit the use of premises for the purpose of selling intoxicating liquors, annuls the unexpired term of a lease of premises for a saloon.

SAME. It is immaterial that permission had been granted to use portions of the premises for other purposes, where the lessee had agreed to rent the premises and use them for a saloon.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered May 19, 1916, upon findings in favor of the plaintiff, in an action by a lessee to recover a deposit paid the lessor to be applied as rent upon premises leased for saloon purposes, tried to the court. Affirmed.

Kerr & McCord, for appellants.

William Wray, for respondent.

[1]Reported in 162 Pac. 31.

HOLCOMB, J.—The one question for consideration on this appeal is whether the enactment by the people at the general election in 1914 of Initiative Measure No. 3, taking effect January 1, 1916 (Laws 1915, p. 2, § 1 *et seq.*; Rem. Code, § 6262-1 *et seq.*), rendered a certain lease for saloon purposes void. The lower court held it did.

The lease in question was originally executed on July 1, 1912, by appellant Sweeney to the firm of Deatkin & Goldie, for the premises at 910 Second avenue, in Seattle, for a term of four years, seven months and twenty-six days, with certain stipulated rentals and a provision that a deposit of $2,500 should be made, and which was made, to be held and applied to the last three months of the rental for the leased term. There was a condition in the lease that "said lessees should not use said premises for any other purpose than that of a saloon." On July 9, eight days after the execution of the lease, the lessees applied to lessor for permission to use the leased premises for a bootblack and cigar stand and for restaurant purposes in addition to the saloon, which permission was granted, and the lease was so modified. Thereafter the premises were used for such several purposes. The lessees with their wives incorporated their business under the name of The Stratford, Incorporated, and own all its stock. After it was modified as above stated, the lease was assigned by Deatkin & Goldie to the appellant brewing company, which company thereafter let the demised premises to the respondent upon the same terms, with one additional condition, viz., that respondent should "purchase all its beer from appellant brewing company during the term of the lease." To sustain their contention that a lease is not avoided by the subsequent intervention of laws prohibiting saloons or the sale of intoxicating liquors in the *locus in quo*, appellants advance the following propositions and cite cases in support thereof:

A lease of property solely for saloon purposes is not terminated by the taking effect, during the term, of a prohibitory liquor law, where, by the construction of the parties, the right

was conferred on the lessee of selling upon the property non-intoxicating beverages and tobacco, so that the right of the lessee was not totally destroyed. *O'Byrne v. Henley*, 161 Ala. 620, 50 South. 83, 23 L. R. A. (N. S.) 496; *Lawrence v. White*, 131 Ga. 840, 63 S. E. 631, 19 L. R. A. (N. S.) 966; *Houston Ice & Brewing Co. v. Keenan*, 99 Tex. 79, 88 S. W. 197; *Barghman v. Portman*, 12 Ky. Law 342, 14 S. W. 342; *San Antonio Brewing Ass'n v. Brents*, 39 Tex. Civ. App. 443, 88 S. W. 368; *Hecht v. Acme Coal Co.*, 19 Wyo. 18, 113 Pac. 788, 117 Pac. 132, Ann. Cas. 1913E 258, 34 L. R. A. (N. S.) 773; *Goodrum Co. v. Potts-Thompson Liquor Co.*, 133 Ga. 776, 66 S. E. 1081, 26 L. R. A. (N. S.) 498; *Shreveport Ice & Brewing Co. v. Mandel Bros.*, 128 La. 314, 54 South. 831; *Gaston v. Gordon*, 208 Mass. 265, 94 N. E. 307.

The tenant of a saloon, in the absence of a stipulation therefor, is not entitled to an abatement in rent because of the passage of a law making the sale of liquor illegal. *Barghman v. Portman, supra; Teller v. Boyle*, 132 Pa. St. 56, 18 Atl. 1069; *Kellogg v. Lowe*, 38 Wash. 293, 80 Pac. 458, 70 L. R. A. 510; *Fleming v. King*, 100 Ga. 449, 28 S. E. 239; *Taylor v. Finnigan*, 189 Mass. 568, 76 N. E. 203, 2 L. R. A. (N. S.) 973; *Miller v. Maguire*, 18 R. I. 770, 30 Atl. 966; *Christian Moerlein Brewing Co. v. Roser*, 169 Ky. 198, 183 S. W. 479.

In effecting a lease of real estate to be used for saloon purposes, it is the duty of the lessee to have inserted in the lease such clause as will protect him in event the sale of liquors on the premises during the lease may be prohibited by law. *Houston Ice & Brewing Co. v. Keenan, supra; Abadie v. Berges*, 41 La. Ann. 281, 6 South. 529; *Miller v. Maguire*, 18 R. I. 770, 30 Atl. 966; *Kerley v. Mayer*, 10 Misc. Rep. 718, 31 N. Y. Supp. 818; *Hecht v. Acme Coal Co., supra; Oldfield v. Angeles Brewing & Malting Co.*, 62 Wash. 260, 113 Pac. 630, 35 L. R. A. (N. S.) 426.

A lease of property permitting its use for saloon purposes is not nullified by the adoption of a statute forbidding fur-

ther sales of liquor in the locality. *Hayton v. Seattle Brewing & Malting Co.*, 66 Wash. 248, 119 Pac. 739, Ann. Cas. 1912C 1050, 37 L. R. A. (N. S.) 432.

Respondent's position is that the performance of the contract is excused by a supervening condition brought about by the operation of a change in the law, making its performance illegal. Great reliance is placed by appellants upon our own case of *Hayton v. Seattle Brewing & Malting Co., supra.* That case involved a lease containing a permission to use the premises for a retail saloon business. There was nothing in it indicating that it was the principal object of the lease and intention of the parties that it be used for that purpose. During the term of the lease, Mount Vernon, wherein the leased property was situate, voted to prohibit saloons under the local option laws then in force. The lessee then abandoned the premises and refused to pay rent, claiming an eviction by operation of law in that the retail saloon business had been prohibited. We said:

"It is argued that the purpose for which the premises were leased becoming unlawful upon the result of the local option election being ascertained, the lease contract thereby ceased to be binding upon appellant. It seems to us that this argument is rested upon an erroneous view of the effect of the language of the lease relating to the use of the premises by appellant. It is apparently assumed by counsel for appellant that the provisions of the lease above quoted restrict the use of the premises to saloon business. We think that provision does not have such an effect. It is only permissive in that respect, and clearly does not prevent appellant from using the premises for any lawful purpose. The decisions of the courts appear to be harmonious in support of the view that, under such circumstances as are disclosed by this defense, the lessee cannot regard the lease as terminated by the changed legal status of the liquor traffic, and thus avoid payment of the rent agreed upon by the terms of the lease."

We there clearly based our decision upon the permissive character of the use granted by the lease, and that it did not prevent appellant (lessee) from using the premises for

any lawful purpose, and was not intended to restrict the use of the premises to saloon purposes.

We are urged to keep in mind, in view of that decision, that, under the terms of the lease here involved as modified, the demised premises may be used during the entire term for restaurant, cigar, and bootblack business, even though its use for a saloon where intoxicating liquors are sold may be prohibited.

There is no doubt that there are courts of the highest authority sustaining appellants' contentions. Cases are numerous but conflicting. It is well settled law, however, that, while the business of selling intoxicating liquors may be lawful at a given time and place, it is equally true that the business is one that the law only countenanced and always held subject to regulation and control or prohibition under the police power of the state. It is a privilege that creates no vested rights, and that the state can and will give, withhold, or withdraw at pleasure. We think it must be conceded that the covenant by the lessee that it "should not use said premises for any other purpose than that of a saloon" was not wholly modified into a purely permissive use therefor by the modification, engrafted thereon after the lease had gone into effect, that the lessee might sublet a portion of the demised premises for a restaurant, cigar, and bootblack business. It is apparent that the principal use of the premises desired by both parties was that of a saloon business. The other businesses were only secondary and incidental thereto. It is shown in another similar case now before us that the charter of Seattle limited the number of saloons to three hundred and fifteen, distributed in three hundred and fifteen locations in the city, and limited the number in a block; and the subject-matter of this lease was one of those permitted locations and a very prominent one. Thus a sort of monopoly for saloons was created in certain locations, the business thereby made very lucrative, and such locations thereby com-

manded the highest rentals for such use. It was, therefore, to the interest of the lessor that the premises be rented for and devoted to that use principally, and such was manifestly the chief object of both parties, and the condition, therefore, was not a special condition for the benefit of the lessor only, but a mutual covenant. In *Beebe v. Tyra*, 49 Wash. 157, 94 Pac. 940, we held that "a stipulation *prohibiting* the lessee from selling any intoxicating liquors on the premises was only a condition subsequent for the benefit of the lessor." But a stipulation for the use for such purpose is otherwise.

Nor are we impressed with the idea advanced by appellants that the "saloon business" does not necessarily mean a business of selling intoxicating liquors, but may mean a business or place for the sale of nonintoxicating drinks. The word "saloon" had acquired a very definite general meaning in this and neighboring states as a place where intoxicating liquors were sold, and was generally so understood. It was generally so designated in the license statutes. The fact that what are commonly called "soft drinks" are also generally sold at such places does not alter the character of such places as "saloons," nor is a place where soft drinks only can be sold commonly known as a "saloon." Furthermore, the condition in the lease that the lessee should purchase beer and malt liquors only of the appellant brewing company, and that it should sell all beer and malt liquors that lessee should sell, of itself would fix the character of the saloon contemplated by both lessor and lessee as a saloon where intoxicating liquors would be sold. *Kahn v. Wilhelm*, 118 Ark. 239, 177 S. W. 403; *Greil Bros. Co. v. Mabson*, 179 Ala. 444, 60 South. 876, 43 L. R. A. (N. S.) 664.

It is a general rule of law, as said in *Cowley v. Northern Pac. R. Co.*, 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559, quoting from an old case:

"That no contract can properly be carried into effect which was originally made contrary to the provisions of law, or which, being made consistently with the rules of law at the

time, has become illegal in virtue of some subsequent law, are propositions which admit of no doubt."

While, when this lease was entered into, it was lawful to lease premises for the sale of intoxicating liquors in the state and in the place covered by this lease, before the term expired it became unlawful for saloons to sell intoxicating liquors, and by an express provision of the law, Initiative Measure No. 3, § 5 (Laws 1915, p. 2, § 5; Rem. Code, § 6262-5), it was made illegal to lease premises for the purpose of such business or to knowingly permit the use of leased premises for such purpose. This change in the law annulled and avoided that portion of the lease requiring, or as appellants say, *permitting* the use of the demised premises for the conducting of a retail saloon, or the sale of intoxicating liquors as contemplated.

It is also true, as asserted by appellants, that the lessor did not guarantee that the lessee should be preserved the continuous right to conduct a retail saloon for the sale of intoxicating liquors. This the lessor could not do. To so contract would have been just as unavailing by reason of the principle that the state, in the exercise of its undoubted police power, could always intervene and render such a guaranty nugatory, and it would be unenforcible as against public policy. Probably, if there had been a clause in the contract of lease stipulating that, in the event that the saloon business should become unlawful in that location, the lease should terminate at once but the lessee should pay all rents reserved for the term, no different question would be presented. Appellants, however, would have the lease construed as so implying, and urge that the lessee could have protected itself against such a contingency but did not, and that the condition to conduct a saloon on the premises was a condition for the exclusive benefit of the lessors. Exactly, and so could the lessors have protected themselves by a provision contrary to the kind above supposed; and we do not agree that the provision in such a lease as that before us, with the principal purpose that lessee

should conduct a saloon on the leased premises, constitutes a condition for the use of the premises exclusively for the benefit of the lessor, which it might either enforce or waive as it saw fit, or as circumstances demanded.

Although, as said, many cases are found which put the entire burden and hazard upon the lessee leasing premises for saloon purposes which afterwards becomes unlawful by operation of law, either locally or generally, many of the cases are based upon the permissive character of the use, and others are not well grounded upon either reason or law.

The broad principle generally applicable is that stated in *Cowley v. Northern Pac. R. Co.*, *supra*, and cases cited therein. That principle has been applied to contracts of this character, and it has been held, for that reason, that the rent contracted for could not be collected. *Heart v. East Tennessee Brewing Co.*, 121 Tenn. 69, 113 S. W. 364, 130 Am. St. 753, 19 L. R. A. (N. S.) 964; *Kahn v. Wilhelm* and *Greil Bros. Co. v. Mabson*, *supra*.

Where the performance of an executory contract which was lawful in its inception is made unlawful by subsequent enactment, the agreement is thereby dissolved and the parties discharged from its obligations. Hammon, Contracts, § 210; 3 Elliott, Contracts, § 1901; Pomeroy, Contracts, § 280; Bishop, Contracts, § 594; Clark, Contracts, § 681; Brantly, Contracts (2d ed.), p. 482; Lawson, Contracts, §§ 423, 424; 9 Cyc. 629; Wharton, Contracts, § 805; *Gray v. Sims*, Fed. Cas. No. 5,729.

But, appellants urge, they have waived the condition that a saloon business should be conducted on the premises and have demanded that lessee continue in possession and use the premises for a restaurant, cigar stand and bootblack stand. The original lease was for a saloon. A very large monthly and total rental was reserved in the lease for that purpose. Afterwards the lease was somewhat enlarged in terms by the permission to sublet a portion for the other purposes. We

do not know what part, if any, of the rental which lessee agreed to pay could be considered as the rental for those other businesses. It takes two parties to make a contract. The lessee contracted to rent certain premises and use them for a saloon, originally, and contracted definitely for that purpose, as did lessors also. The lessee has definitely refused to accept lessors' waiver of the condition to conduct an unlawful business, and one of the parties can no longer perform its contract with the lessee, viz., to furnish beer and malt liquors for sale. It would certainly be harsh and inequitable for a court to force a contract upon either party that neither party contemplated when they contracted in the premises. *Kahn v. Wilhelm, supra.*

All things considered, and without multiplying reasons or authorities, and regardless of authorities to the contrary, we think justice and equity are with the respondent.

We are impelled to hold that the prohibition law, by its terms and in its general effect, dissolved such a lease as the one before us and discharged the parties from its obligations.

Judgment affirmed.

MORRIS, C. J., MAIN, ELLIS, and CHADWICK, JJ., concur.

[No. 13636. Department One. December 29, 1916.]

CHARLES E. SHEPARD, *as Trustee etc., Appellant*, v. P. E. SULLIVAN *et al., Respondents.*[1]

LANDLORD AND TENANT—LEASE—COVENANTS—CONDITIONS. A covenant granting leased premises for the specific use of a saloon business is not a condition subsequent for the benefit of the lessor which could be waived at his option, and therefore not affected by a subsequent act of the legislature making such lease unlawful; but is a conveyance of a limited estate for a limited term which is terminated by the prohibition act.

Appeal from a judgment of the superior court for King county, Smith, J., entered May 27, 1916, upon sustaining a demurrer to the complaint, dismissing an action for rent. Affirmed.

Shepard, Burkheimer & Burkheimer, for appellant.

Ryan & Desmond, for respondents.

HOLCOMB, J.—This case involves a lease for a "first class saloon" in the city of Seattle, and involves generally the same questions considered in the cases of *The Stratford v. Seattle Brewing & Malting Co.*, *ante* p. 125, 162 Pac. 31, and *Aronson v. Sweeney*, *post* p. 698, 162 Pac. 35.

In this case, appellant, the lessor, makes the further contention, in effect, that a lease for a term of years conveys an estate in land, which estate cannot be destroyed by intervening legislation prohibiting saloons, but such prohibition destroys only the covenant for that specific use which is made illegal by operation of law; that such a condition is a condition for the benefit of the lessor, which he may waive or forbear, or the law may annul, without in any way defeating the demise of the estate in the land for the term.

Beebe v. Tyra, 49 Wash. 157, 94 Pac. 940, is cited and relied on by appellant. There we held that a stipulation in

[1]Reported in 162 Pac. 34.

a lease *prohibiting* the sale of intoxicating liquors by the lessee on the premises was a condition subsequent for the benefit of the lessors, which the lessors could waive, or in case of breach, enforce at their option. But the converse of that proposition is not true. Stipulations prohibiting certain uses of premises in leases are not the same as covenants granting the premises for specific uses. The former are certainly conditions for the benefit of the lessor, of his own choice; the latter are covenants to and with the lessee for his benefit and running with the estate; presumptively, the sole object of accepting the grant on the part of the lessee.

We grant that a lease is a conveyance, but it is a conveyance of a limited estate for a limited term with conditions attached. It is not, as appellant asserts, an executed contract. It cannot become wholly executed until the term expires and the conditions are fulfilled. The term may expire at the end of the stated term or it may be terminated sooner by lawful eviction; and one way in which lawful eviction may occur is by operation of law, against the consent of the parties.

If the condition under consideration, granting the demised premises for "a first class saloon, and not to be used for any illegal or immoral purposes," is a covenant it is a mutual covenant of the grantor and the grantee, and has not been, and cannot be, fully performed or executed. It is a covenant for the term and the term is interrupted, and neither can render further performance by reason of the contract being made illegal before the full performance of the covenant.

Thus we return to the consideration of the principles discussed in the preceding case of *The Stratford v. Seattle Brewing & Malting Co.* For the reasons therein stated, this case must follow that decision.

Judgment affirmed.

MORRIS, C. J., ELLIS, MAIN, and CHADWICK, JJ., concur.

[No. 13613. Department Two. December 29, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v. PAUL R. HAFFER, *Appellant*.[1]

LIBEL AND SLANDER—CRIMINAL PROSECUTION—DEFAMATION OF DECEASED PERSON—MALICIOUS INTENT. To constitute common law libel by publishing defamatory matter of any person deceased, malicious intention of the defendant to injure the family and posterity of the deceased must be expressly averred and proved.

SAME—DEFAMATION OF DECEASED PERSON—INJURY TO FAMILY—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 2777, which defines criminal libel by defamation of a person deceased substantially as at common law, requiring that it tend to scandalize or provoke the deceased's surviving relatives or friends, having been superseded by Rem. Code, § 2424, making it libel "to expose the memory of one deceased to hatred, contempt, ridicule or obloquy," a clear legislative intent is manifested to eliminate the prior limitations as to injury to the deceased's relatives and friends; hence defamation of the memory of George Washington is libel under the latter section.

SAME. Rem. Code, § 2424, making it libel to expose the "memory of one deceased" to hatred, contempt, or obloquy, is not restricted to the memory of a deceased existing in the minds of living persons, but applies as well to memory resting in tradition and history.

CONSTITUTIONAL LAW—FREEDOM OF SPEECH. The provision of the Federal constitutional amendment that Congress shall make no law abridging the freedom of speech or of the press is only a limitation upon the power of Congress, and does not apply to state laws.

SAME—FREEDOM OF SPEECH—LIBEL. Const., art. 1, § 5, providing that every person may freely speak or write on all subjects, "being responsible for the abuse of that right," does not give the right to maliciously defame the memory of a deceased person, or render void Rem. Code, § 2424, making such defamation criminal libel.

CRIMINAL LAW—APPEAL—HARMLESS ERROR. A refusal of a motion under Rem. Code, § 2101, to have an information "set aside" because it was not verified, is error without prejudice, where the court properly permitted an amended and verified information to be filed.

CRIMINAL LAW — FORMER JEOPARDY — "DISMISSAL" — STATUTES. Rem. & Bal. Code, §§ 2124, 2125, providing that an order of "dismissal" shall be a bar to another prosecution for the same offense

[1]Reported in 162 Pac. 45.

if it be a misdemeanor, has no reference to an order "setting aside" an information, provided for in Rem. Code, § 2101, in case it is not signed, or verified, etc.; but applies only to dismissals which take the place of the common law *nolle prosequi*.

CRIMINAL LAW—TRIAL—PRESENCE OF ACCUSED. Error cannot be predicated upon instructions to the jurors while the accused was absent from the court room, where the address was to all jurors in attendance on the court touching a matter foreign to the case.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered May 18, 1916, upon a trial and conviction of libel. Affirmed.

P. L. Pendleton and *C. J. Criswell*, for appellant.

Fred G. Remann, *J. W. Selden*, and *Albert E. Joab*, for respondent.

PARKER, J.—The defendant, Haffer, was charged, by information filed in the superior court for Pierce county, with the offense of libel, in that, on the 18th day of February, 1916, he maliciously composed and published in a designated newspaper of general circulation in Pierce county an article tending to expose the memory of George Washington to hatred, contempt and obloquy. The trial of the defendant, had before the superior court sitting with a jury, resulted in a verdict of guilty. Judgment and sentence were accordingly rendered against him by the superior court, from which he has appealed to this court.

The offense charged against appellant and of which he was adjudged guilty is defined in our criminal code of 1909 as follows:

"Every malicious publication by writing, printing, picture, effigy, sign or otherwise than by mere speech, which shall tend: . . . (2) To expose the memory of one deceased to hatred, contempt, ridicule or obloquy; or (3) . . . shall be libel. Every person who publishes a libel shall be guilty of a gross misdemeanor." Laws 1909, p. 940, § 172; Rem. Code, § 2424.

It is conceded that the person concerning whom the alleged libelous article was composed and published is the George Washington who was the most prominent figure in our Revolutionary history, the first president of the United States, and who died in the year 1799. No contention is here made touching the libelous character of the article in question in so far as its language is concerned. We therefore give no consideration to the language of the article. Nor are the merits of the case before us in so far as the fact of the article being maliciously composed and published by appellant is concerned. That question was determined against him by the verdict of the jury, and no question is here raised as to the correctness of that determination. Indeed, that question could not be raised upon this record because the evidence is not before us so as to enable us to review it, even if counsel were so insisting.

The principal contention of counsel for appellant, as we understand them, is that the information does not charge facts constituting the offense of libel, in that no language published concerning a person who has been dead for a period reaching back to a time prior to the birth of any person living at the time of the publication is in law libelous and punishable as such; and that the courts must take judicial notice of the fact that Washington died before any person now living was born. We shall assume, for the purpose of argument, as we proceed, that Washington's death occurred before any person now living was born. We shall also assume, for the purpose of argument, that there is not now living in this state any relatives or posterity of Washington who could be injured or incited to breaches of the peace by the publication here involved. In support of counsel's contention upon this branch of the case, they invoke the common law conception of libel tending to defame the dead, and the limitation which it is claimed that law prescribed touching the intent of the publisher of the libelous language, and the period within which a deceased person can be libeled fol-

lowing his death so as to render the publisher of the libelous words subject to criminal prosecution. Let us first notice the libel of the common law, and the reasons thereof for its limitations here invoked touching the question of intent of the publisher and the presumption that only relatives and friends of the deceased could be injured or incited to breaches of the peace by such publications. We shall then be better able to understand whether or not there is in our new statutory definition of the offense, in so far as it relates to the defamation of the memory of deceased persons, a legislative intent to broaden the common law doctrine and do away with the limitations thereof here invoked by counsel for appellant.

In 3 Wharton's Criminal Law (11th ed.), §§ 1920 and 1921, we read:

"Writings vilifying the character of persons deceased are libels, and may be made the subject of an indictment; but the indictment in such a case must charge the libel to have been published with a design to bring contempt on the family of the deceased, or to stir up the hatred of the people against them, or to excite them to a breach of the peace, otherwise it cannot be sustained.

"But there should be a limit as to time. The Roman law here offers some salutary restrictions for our guidance. . . . A time arises when the interest of just historical criticism demand that the liberty of speech should be unrestrained; and when, even of the most illustrious of the dead, censures the most injurious must be permitted without penal amenability. The modern Roman law declares that this time arrives when the generation living at the death of the person libeled has passed away; . . ."

The learned author here, after defining the offense at common law showing that, in so far as the criminal intent is concerned, it must be an intent to "bring contempt on the family of the deceased, or to stir up the hatred of the people against them, or to excite them to a breach of the peace," seems to draw the conclusion that, at common law, there could be no prosecution for such a libel if it was published

after the generation living at the time of the death of the deceased had passed away, apparently upon the theory that the time had then arrived when no living person could be injured by the libelous publication, and hence when there could be no person to bring contempt upon, or to stir up hatred against, or to excite to a breach of the peace. It is interesting to note that this conclusion of the learned author seems to be rested rather more upon the civil than upon the common law. In Newell on Slander and Libel (2d ed.), p. 965, that learned author says:

"It is a misdemeanor at common law, punishable on indictment with fine and imprisonment, to write and publish defamatory matter of any person deceased, provided it be published with malevolent purpose to injure his family and posterity, and to expose them to contempt and disgrace; for the chief reason of punishing offenses of this nature is their tendency to a breach of the peace. And although the party be dead at the time of publishing the libel, yet it stirs up others of the same family, blood or society to revenge and to break the peace. The malicious intention of the defendant to injure the family and posterity of deceased must be expressly averred and clearly proved."

In the leading case of *The King v. Topham*, 4 Durn. & East. Rep. 126, Lord Kenyon, having under consideration an alleged libelous publication reflecting on the memory of the late Earl Cowper, said:

"Now to say, in general, that the conduct of a dead person can at no time be canvassed; to hold that, even after ages are passed, the conduct of bad men cannot be contrasted with the good, would be to exclude the most useful part of history. And therefore it must be allowed that such publications may be made fairly and honestly. But let this be done whenever it may, whether soon or late after the death of the party, if it be done with a malevolent purpose to vilify the memory of the deceased, and with a view to injure his posterity, as in *R. v. Critchley*, then it comes within the rule stated by *Hawkins;* then it is done with a design to break the peace, and then it becomes illegal. But on that question the jury ought to have had the power to deliberate; . . ."

Prior to the enactment of our criminal code of 1909 defining libel of this character in the language above quoted from Rem. Code, § 2424, our statute defined such libel as follows:

"A libel is the defamation of a person made public by any words, printing, writing, sign, picture, representation, or effigy tending to . . .; or any defamation, made public as aforesaid, designed to blacken and vilify the memory of one who is dead, and tending to scandalize or provoke his surviving relatives or friends. . . ." Laws 1891, p. 119; Rem. & Bal. Code, § 2777.

Here we have in substance the common law definition of such libel. That is, the publication was required to be one designed to "blacken and vilify the memory of one who is dead," and also one "tending to scandalize or provoke his surviving relatives or friends"; from which it might well have been argued, as is done by counsel for appellant, that there could be no surviving relatives or friends to be injured by the publication of libelous language concerning the deceased when such period had elapsed after the death of the deceased that there would be no surviving relatives or friends of the deceased. Now this former statutory definition of libel of this character, which as we have seen was, in substance, the common law definition, was the law existing and presumably known to the legislature when it passed the criminal code of 1909 containing this new definition of the offense in the language of § 2424, above quoted, which new definition eliminates all reference to the effect of the publication upon relatives or friends of the deceased or any other designated class of persons as an element of the defined offense, and which declares in unqualified terms such language maliciously published tending "to expose the memory of one deceased to hatred, contempt, ridicule or obloquy" to be libel. It seems to us that the later enactment of § 2424, in view of the then state of the law, evidences a clear legislative intention to eliminate prior limitations of the law touching the publisher's intent

and the injury to living relatives and friends of the deceased as an element of the offense. So we conclude that the reasons of the common law are no longer controlling, and that, under this new statutory definition of the offense, it is not a question of whether the memory of the deceased is defamed to the injury of his living relatives and friends to the end that they be not provoked to breaches of the peace, but it is simply a question of whether or not the libelous publications tended "to expose the memory of one deceased to hatred, contempt, ridicule or obloquy." If such is the tendency of this publication and it was maliciously made, we see no escape from the conclusion that the act was an offense within the meaning of this new statute. If it be necessary to look for a reason prompting the legislature to thus broaden the definition of the offense, we may well presume that it can be found in the conclusion of the legislature, which clearly is within the bounds of reason, that all publications tending to defame the memory of deceased persons might have the tendency to excite some persons to breaches of the peace whether they be relatives or friends of the deceased or others who may have a high regard for the deceased, though such regard rest only upon traditional or historical knowledge.

Some contention is made that the word "memory," as used in § 2424, above quoted, defining the offense of which appellant was convicted, means only the memory of a deceased person existing in the minds of living persons without the aid of and apart from tradition and history, and that, therefore, the memory of Washington is not the "memory of one deceased" mentioned in § 2424. We are unable to agree with this contention. The word "memory," as used in that section, we think, is that which is defined in the Standard Dictionary as follows:

"The state of being remembered, a living continuously in the minds of men; posthumous fame; commemoration, as, the *memory* of Washington will endure."

We are of the opinion, therefore, that the words "memory of one deceased," as used in that section, means the memory of a person existing in the minds of the living, whether such memory rests upon the actual personal knowledge of the living, or upon historical or traditional knowledge.

Counsel for appellant invoke the guaranty of the first amendment to the constitution of the United States, which, so far as here necessary to notice its language, reads: "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ." One complete answer to this contention is that this amendment is, by its express language, only a limitation upon the power of Congress. Judge Cooley in his Constitutional Limitations (7th ed.), p. 46, observes:

"It is to be observed of this instrument, that being framed for the establishment of a national government, it is a settled rule of construction that the limitations it imposes upon the powers of government are in all cases to be understood as limitations upon the government of the Union only, except where the states are expressly mentioned."

So we are not here concerned with the question of the extent of freedom of speech or of the press in the light of this Federal constitutional amendment. Section 5, article 1 of our state constitution touching this subject reads:

"Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right."

thus recognizing that this is not a guaranteed liberty wholly unrestrained by the law, which looks to the preservation of public peace and welfare. We are quite unable to appreciate an argument which suggests that any one has a constitutional right to maliciously defame the memory of a deceased person, though such person's memory lives only in history, any more than to maliciously defame a living person. We have no reference to historical criticism made in good faith in a temperate manner. "The law will always take into consideration the mind with which such publications are

made, and discriminate between the historian and the slanderer." Newell, Libel and Slander (2d ed.), p. 965.

Contention is made in appellant's behalf that the trial court erred in denying his motion to dismiss the original information filed against him and in granting the prosecuting attorney's motion to file an amended information. Appellant's motion to dismiss was made upon the ground that the information had not been verified as required by Rem. Code, § 2051. As the original information appeared upon its face not to have a certificate indorsed thereon showing its verification, though it was signed by the prosecuting attorney, appellant's motion seemed to be well founded. Thereupon the prosecuting attorney immediately filed his motion asking permission to file an amended information. The two motions came on for hearing and were disposed of by the trial court at the same time, resulting in an order denying appellant's motion and in an order granting the prosecuting attorney's motion. Thereupon the prosecuting attorney filed an amended information in the exact language of the original, which amended information was duly verified by him as evidenced by certificate of the clerk of the court indorsed thereon. This amended information is the one upon which appellant was tried and convicted.

It is argued that the appellant was entitled to have the original information dismissed and such dismissal treated as a bar to his further prosecution of the particular offense therein charged, because of the fact that the offense was only a gross misdemeanor. Rem. Code, § 2101, by express terms, entitles a defendant to have the information "set aside" "when it is not verified." The word "dismiss" is not used in this section, though its provisions are relied upon by counsel for appellant as entitling him to dismissal in the sense of an abandonment of the prosecution by the state, rendering him thereafter immune from prosecution for the offense as in the case of former jeopardy. We notice that this section uses the words "set aside" and not "dismiss," as

an indication that the legislature did not intend that the setting aside of an information upon this ground should have the effect of a dismissal of the prosecution in the sense claimed by counsel. It would seem that the court did commit technical error in refusing to set aside the original information, assuming that appellant's motion was in substance a motion to set aside the information under § 2101. This, however, would be wholly without prejudice if the court was not in error in permitting the amended information to be filed. And this brings us to the real question in this branch of the case.

Counsel for appellant invoke the provisions of Rem. & Bal. Code, § 2125, reading as follows:

"An order for dismissal as provided in this chapter is a bar to another prosecution for the same offense, if it be a misdemeanor; but it is not a bar if the offense charged be a felony."

Now what is the "dismissal as provided in this chapter" as these words are used in § 2125? That section was § 777 of the code of 1881 and has remained unchanged to the present time. The dismissal so referred to is manifestly that dismissal which the statute designed to take the place of the *nolle prosequi* of the common law, as provided in the two preceding sections as follows:

"The court may, either upon its own motion or upon application of the prosecuting attorney, and in furtherance of justice, order an action, after an indictment or information, to be dismissed; but in such case the reason of the dismissal must be set forth in the order, which must be entered upon the record."

"The entry of a *nolle prosequi* is abolished, and no prosecuting attorney shall hereafter discontinue or abandon a prosecution except as provided in the last section."

Being §§ 775 and 776, Code of 1881, and §§ 2123 and 2124, Rem. & Bal. Code. Plainly the dismissal referred to in § 2124, Rem. & Bal. Code, being § 776, Code of 1881, has

no reference to the setting aside of the information provided for in § 2101, Rem. Code, touching the requisites of informations. If there was ever any doubt upon this question it is, in any event, set at rest by the following provisions of our criminal code of 1909:

"No order of dismissal or directed verdict of not guilty on the ground of a variance between the indictment or information and the proof, or on the ground of any defect in such indictment or information, shall bar another prosecution for the same offense." Rem. Code, § 2316.

We conclude that it is only those dismissals of misdemeanor prosecutions, made by the court upon its own motion or upon the motion of the prosecuting attorney, in such manner as to evidence an abandonment by the state of the prosecution of the defendant for the misdemeanor charged, and which take the place of the common law *nolle prosequi*, that render an accused immune from another prosecution for the same misdemeanor. Plainly the dismissal, or rather setting aside of the information, which appellant was here possibly technically entitled to, would not, even if granted, have rendered him so immune.

Finally, it is contended in appellant's behalf that the trial judge erred in excluding him from the court room and addressing the jury during the progress of his trial. A careful examination of the record before us convinces us that this did not occur; that is, that the trial judge did not address the jury in the absence of the appellant at any time while his trial was in progress. It is true that, upon one of the adjournments of the trial, the judge had occasion, as he conceived it to be his duty, to address all of the jurors in attendance upon the court, including those engaged in appellant's trial as well as others, touching a matter foreign to appellant's case; and that, upon the direction of the trial judge, all of the jurors so in attendance upon the court remained in the court room after all other persons had, by direction of the court, retired therefrom. The jurors en-

gaged in appellant's trial were not kept together during the adjournments of the court. Indeed, by the express provisions of Rem. & Bal. Code, § 346, it was the duty of the court to allow them to separate during the adjournments. We therefore have in effect the same situation as if the trial judge had met and conversed with the jurors at some other place than in the court room about a matter foreign to appellant's trial. No showing is here made that the judge's talk to the jurors had reference to appellant's trial. Indeed, what evidence there is in this record upon that subject all but conclusively proves to the contrary. It seems quite plain to us that the trial judge did not commit error as claimed in this respect.

We conclude that the record before us discloses no error prejudicial to appellant entitling him to a reversal of the judgment or to a new trial. We see no escape from the conclusion that the judgment must be affirmed. It is so ordered.

MORRIS, C. J., MOUNT, HOLCOMB, and FULLERTON, JJ., concur.

[No. 13643. Department One. December 29, 1916.]

ANNE JENSEN, *Respondent*, v. ALFRED LAWRENCE, *Appellant*.[1]

RAPE—CIVIL LIABILITY—EVIDENCE—CORROBORATION. In a civil action for assault and rape, it is not essential that the plaintiff be corroborated, since the repeal of Laws 1913, p. 298, § 1, requiring corroboration in criminal cases.

NEW TRIAL—CONFLICTING EVIDENCE. The improbability of contradictory evidence is not ground for a new trial, where the jury was capable of passing on the same.

APPEAL—REVIEW—NEW TRIAL—DISCRETION. Refusal to grant a new trial for insufficiency of the evidence to support the verdict, will not be disturbed on appeal except for abuse of discretion.

RAPE—CIVIL LIABILITY—EVIDENCE — SUFFICIENCY. The evidence in a civil action for assault and rape is not insufficient to sustain a verdict from the fact that plaintiff made no outcry, where she testified that she resisted and was overcome by force and that there was intercourse against her consent.

SAME—DEFENSES—FAILURE TO MAKE OUTCRY. In a civil action for rape, the failure of the plaintiff to make an outcry, or complaint within a reasonable time, may be explained or excused, and is merely a circumstance which the jury may consider as tending to impeach the plaintiff, and not a defense as a matter of law.

SAME—CIVIL LIABILITY—INSTRUCTIONS. In a civil action for assault and rape, the issue is properly submitted by an instruction defining an unlawful assault and defining rape and making the liability depend upon whether the defendant wrongfully and unlawfully committed the act of criminal intercourse upon plaintiff without her consent.

SAME. In such an action, a requested instruction to the effect that plaintiff could not recover if she had been guilty of improper conduct intended to attract the defendant's attention, is properly refused, where he might have been guilty of the rape notwithstanding that circumstance.

SAME—CIVIL LIABILITY—DAMAGES. A verdict for $5,000 damages for assault and rape is not so excessive as to be evidence of passion or prejudice.

Appeal from a judgment of the superior court for King county, Frater, J., entered April 26, 1916, upon the ver-

[1]Reported in 162 Pac. 40.

dict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

Farrell, Kane & Stratton, for appellant.

John H. Perry, for respondent.

HOLCOMB, J.—This action is one to recover damages resulting from an alleged assault and act of carnal intercourse committed by defendant upon plaintiff in Seattle. The complaint, in substance, alleges: That, from the 23d day of May, 1914, to the 6th day of June, 1914, plaintiff was the regularly employed housekeeper for defendant; that, while engaged in her duties as such, on the first day of June, 1914, defendant wrongfully, unlawfully and violently assaulted her, threw her on the bed, physically overpowered her and forcibly committed an act of carnal intercourse upon her, despite her vehement protests and earnest supplications not to do so, and causing plaintiff pain, suffering, humiliation and damage in the sum of $10,000. The answer denies each and every allegation contained in the complaint, and affirmatively alleges that such allegations are false and malicious and made with the sole purpose of extorting money from defendant. No reply was filed, and the issues being made, the case was tried before a jury. At the conclusion of all the testimony, defendant moved the court for a directed verdict based upon the insufficiency of the evidence, which motion was denied. The jury returned a verdict for plaintiff for $5,000. Thereafter defendant moved the court both for judgment *non obstante veredicto* and, in event of the denial of said motion, for a new trial, which motions were denied.

Considerable argument is first devoted by counsel to the want of corroboration of the testimony of plaintiff as grounds for reversal and a new trial. Corroboration, since the statute requiring same was repealed by the act of 1913 (Laws 1913, p. 298, § 1), is no longer required even in criminal prosecutions for carnal crimes, and therefore, in the absence of a

specific statute so requiring in civil cases, is not a rule of evidence here. Consequently, assuming that no facts or circumstances were adduced in corroboration of plaintiff's evidence as to the alleged assault, she testified fully respecting it, and her evidence fully supported the allegations of her complaint if believed by the jury, and the verdict of the jury, if uninfluenced by any taint in law, is conclusive upon that fact.

The argument that "where the evidence in such case as the one at bar is improbable, contradictory and opposed to every instinct of human nature, it is the duty of this court to grant a new trial," is incorrect. In the first place, the jury passed upon the "contradictory" and "improbable facts" and are presumed to be equally capable, or even more capable, than the court of passing upon facts of such character, even to judge whether such facts are "opposed to every instinct of human nature." In the second place, the trial judge also passed upon those facts in passing upon the motion for new trial, exercising his judicial discretion therein, and permitted the facts produced by the plaintiff to sustain the verdict in her favor. In such case, it has long been the settled rule in our state that this court cannot interfere, in the absence of such error as actually or presumptively prevented a fair trial to the losing party. *Bucklin v. Miller*, 12 Wash. 152, 40 Pac. 732; *Miller v. Bean*, 13 Wash. 516, 43 Pac. 636; *Hindle v. Holcomb*, 34 Wash. 336, 75 Pac. 873; *Leghorn v. Review Pub. Co.*, 31 Wash. 627, 72 Pac. 485; *In re Renton*, 61 Wash. 330, 112 Pac. 348; *Snider v. Washington Water Power Co.*, 66 Wash. 598, 120 Pac. 88; *Mattson v. Eureka Cedar Lumber & Shingle Co.*, 79 Wash. 266, 140 Pac. 377; *Brown v. Walla Walla*, 76 Wash. 670, 136 Pac. 1166.

A further argument upon the facts is made by appellant that the plaintiff, according to her own evidence, made no outcry at the time of the alleged assault nor any complaint immediately afterwards, and it is therefore asserted that her testimony as to an assault and rape is improbable, incredible

and unworthy of belief. She testified, that she resisted and that she struck appellant as fast as she could; that she never gave her consent; that appellant overcame her by his superior force and had intercourse with her against her consent. Similar arguments were advanced in the criminal case of *State v. Pilegge*, 61 Wash. 264, 112 Pac. 263, and were there disapproved. "Did the defendant use force?" "Did the woman persistentlv refuse her consent?" "Did the accused accomplish the sexual intercourse?" These questions being answered affirmatively, the offense would be rape. *State v. Sudduth*, 52 S. C. 488, 30 S. E. 408.

The other propositions go to the questions of the probabilities and credibility of the story of the plaintiff. They are questions of fact purely, and for the jury. Upon these features the trial court instructed:

"You are instructed that if at the time of the alleged assault, or within a reasonable time thereafter, the plaintiff did not make an outcry, and that she did not do so as soon thereafter as opportunity offered itself, unless she was prevented from making such outcry by fear and threats, plaintiff would not be entitled to recover. And if the plaintiff failed to disclose the alleged outrage said to have been committed, within a reasonable time after she had opportunity to do so, that would be a circumstance which you may consider as tending to impeach the truth of her story."

This instruction was excepted to and is criticized, and the argument against it is the same as that heretofore referred to touching the facts themselves. No authorities are cited by appellant tending to show the above instruction erroneous, and, in our opinion, it is as favorable to appellant as could be desired. It plainly informed the jury that they were to consider the question of whether or not plaintiff made an outcry at the time or as soon thereafter as opportunity offered itself, and that, unless she was prevented from making such outcry by fear and threats, she could not recover, and that, if she failed to disclose the alleged outrage within a reason-

able time after she had opportunity so to do, that would be a circumstance to be considered as tending to impeach the truth of her story. Plaintiff had testified, explaining her failure to make complaint after the alleged offense, that appellant had threatened her with some kind of prosecution and of sending her to jail, and had told her that he had had experience in such matters before. Her explanation, in connection with all her other testimony tending to support her case, was for the jury to consider as part of the facts, and we cannot see how the facts could have been submitted to the jury under any fairer instruction than was given in the foregoing.

The law considers that failure to make complaint is merely an important circumstance to go to the jury and does not make the matter of complaint a question of law. A delay, or even failure to complain at all, may be accounted for by proof of circumstances excusing such delay. 33 Cyc. 1523; *Schenk v. Dunkelow*, 70 Mich. 89, 37 N. W. 886; *Smith v. Hendrix*, 149 Iowa 255, 128 N. W. 360; *Kramer v. Weigand*, 91 Neb. 47, 135 N. W. 230.

It is contended that the court erred in giving instruction No. 7 to the jury, and the only argument made in support of this contention is that the previous contentions of error are so pertinent to the point raised by this assignment that appellant deems repetition thereof useless. Instruction No. 7 was one defining an unlawful assault, defining rape, and telling the jury that if they believed from a preponderance of the evidence, as that had been defined to them, that the defendant did, on or about the 6th day of June, 1914, wrongfully, unlawfully and violently assault the plaintiff and forcibly commit an act of criminal intercourse upon plaintiff against her protest and supplications not to do so, thereby causing plaintiff great pain, suffering and humiliation as alleged in the complaint, then it would be their duty to return a verdict for the plaintiff. And, on the other hand, if they

were not so satisfied, then it would be their duty to return a verdict for the defendant. We think this instruction properly submitted the issues to the jury in connection with the other instructions which have been quoted and approved, and that there is no error in it.

It is next contended by appellant that the court erred in refusing to give appellant's requested instruction No. 7, which is as follows:

"Members of the jury, I instruct you that if you find from the evidence that plaintiff Anne Jensen, while in the home of Mr. Lawrence, acted in an unbecoming and vulgar manner; and at times exposed her person intentionally, to attract the attention of Mr. L.; and at other times went down stairs into the living room where guests were present in a nightgown and kimono; and at other times by gestures, expressions of the eyes, signs, nudges, and otherwise tried to attract and secure the attention of Mr. Lawrence—then I instruct you that these are circumstances to be taken into consideration by you in determining whether or not the plaintiff acted with design in doing what she did."

There was some testimony on behalf of appellant to which the above requested instruction would apply, but we do not consider the refusal to give the instruction prejudicial. If the jury had believed all the testimony to which that requested instruction applied, they could still reasonably determine from the other evidence that plaintiff forcibly and unlawfully raped and ravished plaintiff against her consent.

Lastly, appellant contends that the verdict is excessive and manifestly the result of haste, passion and prejudice. A number of cases are cited to sustain recoveries for smaller amounts, but the fact that recoveries for smaller amounts have been sustained by appellate courts is no argument against sustaining a verdict for a larger amount when within the evidence. A recovery of $5,000 in a very similar case was sustained in *Kramer v. Weigand, supra*, and we are not prepared to say in this case that, any recovery at all being permissible, the recovery of $5,000 is alone evidence of haste,

passion and prejudice on the part of the jury. We therefore cannot hold it excessive.

Finding no error, the judgment is affirmed.

MAIN and ELLIS, JJ., concur.

[No. 13663. Department One. December 29, 1916.]

F. B. PLATH, *as Administrator etc.*, *Appellant*, v. PAT MULLINS *et al.*, *Respondents*.[1]

APPEAL—REMAND—DIRECTIONS—ENTRY OF JUDGMENT. Upon reversing a judgment for defendants and remanding with directions to enter judgment for plaintiff, in an action to subject real property to a judgment, the trial court is without power to direct an accounting for personal property and rents and profits, or to decree a lien on the lands for the purchase price advanced, when those questions were not an issue or presented or passed upon by the appellate court.

EXECUTORS AND ADMINISTRATORS—LIENS FOR ADVANCES. Where an administrator brought an action to subject equitable interests in certain lands to the claims of creditors of the estate, he is not entitled to have a lien declared for the sums he intends to advance to pay the purchase price of the lands, but is properly relegated to the probate proceedings where the court can make an appropriate order with all the heirs before the court.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered May 15, 1916, in favor of the defendants, after order of remand from the supreme court, in an action by an administrator to subject an equitable interest in real property to the claims of creditors. Affirmed.

Wende & Taylor and *E. B. Velikanje*, for appellant.

H. J. Snively, for respondents.

CHADWICK, J.—This case was before the court and opinion rendered in 87 Wash. 403, 151 Pac. 811. The court below was directed to enter a judgment in favor of appellant, the

[1]Reported in 161 Pac. 1187.

plaintiff and present appellant. Counsel prepared, and submitted to the court below a form of judgment complying with our holding, and providing further that the defendants should account to the plaintiff for all personal property—situate upon the lands in controversy at the time respondents took possession—in which A. W. Burnett, deceased, had an interest, or for the value thereof, and for the rents, issues and profits of the land from and after the 4th day of November, 1910, and further providing:

"That the said lands and premises in the hands of said administrator be impressed with a lien in favor of said administrator and as against the defendant Josie Burnett and all other persons claiming as heirs at law of the said A. W. Burnett, deceased, or by, through or under the will of said A. W. Burnett, deceased, for the said sum of four thousand eight hundred twenty-six and 36-100 ($4,826.36) dollars;"

being the amount due defendants Mullins upon the contract of purchase described in our former opinion. The trial judge refused to enter the judgment in the form proposed, in so far as it required defendants Mullins to account for personal property and for the rents and profits of the lands; and in so far as it was proposed to make the amount to be paid for a deed to the premises a lien upon the lands for the purchase price to be advanced by the administrator.

While the trial judge seems to have gone extensively into the questions of accounting, we think that phase of the case may be disposed of without resorting to the pleadings or the evidence taken at the former hearing. The only question passed upon by this court was whether the land was community or separate property. We held it to be community property. The only thing left open was to provide for some method of transferring the title from defendants Mullins to the administrator of the estate of Burnett, deceased. There was no holding by this court that the defendants should account either for personal property or for the rents, issues, and profits of the land. If plaintiff conceived, as he now as-

serts, that these questions were within the issues, and not passed upon, or should have been passed upon by this court, his remedy was here, and he should have called it to our attention either by motion or by petition for rehearing. Not having done so, he cannot now take judgment in the court below upon any controverted question that goes to the merits. *Richardson v. Sears*, 87 Wash. 207, 151 Pac. 504.

Neither is plaintiff entitled to declare a lien on the land for the sum he intends to advance to the estate to pay the purchase price of the land. Equitable liens are not to be declared upon potential facts. The administrator has not, so far as the record indicates, paid any money for or on behalf of the estate. While executors and administrators are to be recompensed for advances made under the direction of, or when ratified by, the court sitting in probate, it is beyond the power of the court, under the issues tendered in this case, to create a lien dependent upon a contingency that may never occur.

Plaintiff's remedy is in the administration proceeding, where the court may, by appropriate order, sanction any advances made by the administrator, and at the same time protect the heirs and others interested in the estate. The estate will there be chargeable with all sums advanced under the direction of the court. The court may protect plaintiff by lien or other appropriate order if, in its judgment, his advances have tended to the preservation of the estate. 18 Cyc. 570.

Much of the plaintiff's argument is predicated upon the thought expressed in *Lawrence v. Halverson*, 41 Wash. 534, 83 Pac. 889, that a litigant will not, under our code system of remedies, be expelled from one door of the court with the admonition to enter at another. We are putting no such burden upon appellant. He is the administrator of the estate of Burnett, deceased, and as such has brought an independent action. It is he who has entered the court by two doors, and he should not be heard to complain if he is directed to

take his remedy in that proceeding which, in the judgment of the court, is more appropriate, and where the heirs and all parties interested may be heard in their own behalf.

Affirmed.

MORRIS, C. J., MAIN, ELLIS, and WEBSTER, JJ., concur.

[No. 13697. Department One. December 29, 1916.]

N. C. STRONG, *Respondent*, v. J. T. DURDLE *et al.*, *Appellants*.[1]

BANKRUPTCY — SCHEDULE OF PROPERTY — COMMUNITY DEBT AND PROPERTY. Where a judgment was recovered against a husband and wife, as a community debt, and the husband filed a petition in bankruptcy and was declared a bankrupt, a lot constituting community property and a tract conveyed by the husband to the wife as her separate property in fraud of creditors are properly scheduled as assets in the bankruptcy proceeding.

SAME—SCHEDULE OF PROPERTY—PROCEEDINGS—AMENDMENT — NOTICE. An amendment adding certain property to the schedule of assets of a bankrupt cannot be attacked for want of notice by one who had her day in court in an action to determine that the property was an asset and liable for the debts.

SAME—PROPERTY CONVEYED IN FRAUD OF CREDITORS—SALE—RIGHTS OF PURCHASER—QUIETING TITLE. Since a trustee in bankruptcy has a right to sell property which has been conveyed fraudulently more than four months prior to the filing of the petition, the purchaser from the trustee may maintain an action to quiet his title against the fraudulent grantee.

SAME—SALE—QUIETING TITLE—FORM OF DECREE. Where title to property of a bankrupt, fraudulently conveyed more than four months prior to the filing of the petition, was quieted in the purchaser from the trustee in bankruptcy, the fraudulent grantee has no right to redeem the property; and hence cannot complain of a provision in the decree giving her the right to redeem within one year upon paying the purchaser's claim against the bankrupt's estate.

Appeal from a judgment of the superior court for Grays Harbor county, Sheeks, J., entered February 23, 1916, in

[1]Reported in 162 Pac. 6.

favor of the plaintiff, in an action to quiet title, tried to the court. Affirmed.

O. M. Nelson, for appellants.

Tom W. Holman, for respondent.

MAIN, J.—The purpose of this action was to quiet title to real estate.

The defendants named in the complaint were J. T. Durdle and Sarah E. Durdle, his wife, and J. E. Stewart, trustee in bankruptcy of the estate of J. T. Durdle. The trial of the cause resulted in the judgment sought by the complaint. From this judgment, Sarah E. Durdle appeals. The facts are these:

On the 29th day of May, 1914, the respondent, in an action in the superior court of Chehalis county, obtained a judgment against J. T. Durdle and "against the community consisting of the defendants J. T. Durdle and Sarah E. Durdle." On July 20, 1914, J. T. Durdle filed a voluntary petition in bankruptcy in the Federal court. After this petition was filed and Durdle was adjudged a bankrupt, a schedule of the assets and liabilities of the bankrupt estate was filed. N. C. Strong, the respondent here, appeared in the bankruptcy proceeding and filed his claim, and later, on September 25, 1914, filed a petition asking that the schedule of assets be amended, and that there be included therein two tracts of land, one described as lot 10 in a certain addition to the town of Montesano, and another tract in the same addition. The latter, in the briefs, is simply referred to as the "tract," to distinguish it from the lot, and a like manner of reference will be here adopted for the purpose of avoiding repetition of a detailed description. The referee in bankruptcy, after a hearing upon the petition to amend the schedule of assets, entered an order directing that lot 10 and the tract be included in the schedule of assets of the bankrupt's estate. On October 10, 1914, the referee in bankruptcy entered an order directing the trustee to sell the interest of the bankrupt estate

in lot 10 and the tract. Acting under this order, both pieces of property were sold, and purchased by the respondent, Strong. This sale was confirmed by the referee, and the trustee was directed to execute the deed to Strong. On October 13, 1914, the trustee in bankruptcy, by deed, conveyed lot 10 and the tract to the respondent. Thereafter, and on or about the 24th day of October, 1914, the present action was instituted for the purpose of quieting title in the respondent.

On the trial, two questions of fact were litigated. First, was lot 10 community property, and second, had the tract been conveyed by J. T. Durdle to his wife for the purpose of defrauding creditors? The trial court sustained the contention that lot 10 was community property, and that the other tract had been fraudulently conveyed to Mrs. Durdle. Without reviewing the evidence in detail, it may be said that, in our opinion, the weight of the evidence sustains the judgment of the trial court. If lot 10 was community property, there can be no question but that it was properly added to the schedule of assets in the bankruptcy proceeding for the purpose of meeting claims properly chargeable to the community, because, as above noted, the respondent's judgment was a community judgment. Likewise, if the tract had been fraudulently conveyed by J. T. Durdle to his wife as her separate property, in fraud of creditors, it was properly scheduled as assets in the bankruptcy proceeding. It is claimed by the appellant that she did not have legal notice of the proceedings in the bankruptcy court by which the schedule of assets was amended. The order of the referee recites "notice having been duly given of hearing upon such petition." But assuming, without deciding, that the appellant may attack in this proceeding the recital in the order of the referee, she has not been harmed, even though she had no notice of the bankruptcy proceeding. She has had her day in court in the present action, where the question whether lot 10 was community property and whether the tract had been conveyed in

fraud to creditors was fully litigated and determined against her.

The principal contention of the appellant in this case, however, appears to be that the respondent has no right to bring this action, but that the trustee in bankruptcy should have instituted the proceeding. This contention assumes that the respondent here is bringing the action as a creditor of the bankrupt estate, but this is not the capacity in which he sues. The action was instituted by the respondent not as a creditor, but as a purchaser of the property sold in the course of the bankruptcy proceedings. The property here in controversy passed to the wife more than four months prior to the date on which the petition in bankruptcy was filed. It is the holding of Federal courts that property conveyed in fraud of creditors more than four months prior to the time of the filing of the petition in bankruptcy may be sold, and the purchaser will take such title as the trustee in bankruptcy may have had, together with the right to institute an action for the purpose of setting aside the fraudulent conveyance. In *In re Downing*, 192 Fed. 683, it was said:

"It seems to me that inasmuch as the trustee in bankruptcy is vested with all the rights, remedies, and powers of a judgment creditor of the bankrupt with execution returned unsatisfied, and one of those rights is (assuming the transfer was in fraud of creditors) to set aside the transfer, have the specific real property sold, or sell same, and the proceeds applied to the payment of all proved and allowed claims against the bankrupt, the trustee has an interest in such property. His rights and interest are something more than a mere possibility or expectancy, not coupled with any interest in or growing out of property. And it is something more than a litigious right. If the action is prosecuted successfully, the judgment reaches and operates on the specific property sold or transferred by the bankrupt, the title of the fraudulent vendee is divested, and the true title transferred to a purchaser or to the trustee in bankruptcy and the proceeds so far as necessary go to the trustee for creditors or to the purchaser of such rights from such trustee. It is true

that the transferee (assignee) of the trustee in bankruptcy would not be prosecuting the action for the benefit of the creditors of the bankrupt, but in his own interest and for his own benefit. The answer to this is that such assignee of the trustee has paid a consideration for the transfer of the rights to the trustee who holds same for the creditors. The creditors do not object to this mode of realizing on the claim or right of action, but, in fact, make a resort thereto necessary. The assignment of the right of action with a transfer of such interest as the trustee has in the real property in no way prejudices Mrs. Downing. She is not deprived of any defense."

That case was reviewed by the circuit court of appeals for the second circuit, *In re Downing*, 201 Fed. 93, and the judgment of the district court affirmed. It was there said:

"The trustee has a transferable interest in real estate owned by the bankrupt and transferred by him in fraud of his creditors, even though made more than four months prior to the proceedings in bankruptcy, and may sell this interest, together with the right vested in him by statute to maintain an action to set aside such fraudulent transfer.

"The sale is to be made without warranty or representation of any kind and the purchaser takes simply the trustee's interest in the real property and his right to bring an action. The right may be valuable and it may be worthless; whoever buys does so with a full understanding of the character of the claim, he cannot be misled into thinking that the District Court or this court has in any way recognized the validity of the claim by directing that it be sold."

In *Belding-Hall Mfg. Co. v. Mercer & Ferdon Lum. Co.*, 175 Fed. 335, it was held that the assignee of a trustee in bankruptcy could not maintain an action to set aside a voidable preference where the property had been transferred within the four months next preceding the filing of the petition in bankruptcy. The Federal courts make a distinction between the right of the trustee in bankruptcy to sell property which has been conveyed fraudulently more than four months prior to the filing of the petition in bankruptcy, and

property which has been transferred within four months of the filing of such petition and therefore constitutes a voidable preference under the Federal bankruptcy act.

The appellant complains of the form of the judgment of the trial court, in this: The judgment provided that the appellant should have one year in which to redeem the property and pay the respondent's claim, but that if she failed to do this, then the title would stand quieted in the respondent. The judgment giving the right to the appellant to redeem, was in her favor, and was not appealed from by the respondent. If the respondent acquired a good title by virtue of the sale in bankruptcy, the appellant did not, as a matter of right, have the privilege of redeeming. This, however, was given her by the trial court out of the equitable consideration of the case. As the judgment now stands, if the appellant pays the amount of the respondent's claim specified in the judgment, she retains title to the property.

There is no reason why the judgment in this particular should be disturbed.

The judgment will be affirmed.

MORRIS, C. J., CHADWICK, PARKER, and ELLIS, JJ., concur.

[No. 13732. Department One. December 29, 1916.]

THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM A. COTZ, *Appellant*.[1]

CRIMINAL LAW—HABITUAL CRIMINALS—INDICTMENT AND INFORMATION—SUFFICIENCY. An information charging the accused with being an habitual criminal under Rem. Code, § 2286, substantially in the language of the statute, is sufficient although it does not affirmatively allege that the prior convictions were had in courts of competent jurisdiction, nor formally plead each step in the procedure to final judgment.

SAME—HABITUAL CRIMINALS—INDICTMENT AND INFORMATION—SUFFICIENCY—STATUTES—REPEAL. Rem. & Bal. Code, § 2177, requiring that an information against an habitual criminal must set forth the fact, time and place of the former convictions, was repealed by Rem. Code, § 2286, a later enactment covering the whole subject-matter.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered April 22, 1916, upon a trial and conviction of being an habitual criminal. Affirmed.

Beeler & Sullivan, for appellant.

Alfred H. Lundin, *Everett C. Ellis*, and *Joseph A. Barto*, for respondent.

ELLIS, J.—Defendant was charged with being an habitual criminal. From a conviction, judgment and sentence, he appeals.

The only question raised is as to the sufficiency of the information. Saving the differences in the nature of the crimes of which the prior convictions are charged, the information is couched in the same terms as that set out and sustained in the opinion of this court in *State v. Rowan*, 84 Wash. 158, 146 Pac. 374. It is therefore unnecessary to quote it here. Appellant urges that it is insufficient in that it is not affirmatively alleged that the prior convictions were had in a court or courts of competent jurisdiction, and in that each step in the procedure from indictment or information to final

[1]Reported in 161 Pac. 1191.

judgment is not formally pleaded. It is argued that this is necessary under the statute of 1903, Rem. & Bal. Code, § 2177, which required that the information should set forth "the fact of such former conviction or convictions, with the time and place when and where such former convictions occurred."

It would be a sufficient answer to say that the information here does set forth the fact, time and place of the former convictions; but in any event, it is a conclusive answer that the statute relied upon has been repealed and superseded by the criminal code of 1909, of which § 34 is Rem. Code, § 2286, under which the information here involved was filed. It was so held in *State v. Gustafson*, 87 Wash. 613, 152 Pac. 335. In *State v. Rowan*, *supra*, it was held, in effect, that an information, of which the one before us is almost a replica, was sufficient in that it charged the crime substantially in the language of the statute. True, the exact objection here raised was not there presented, but it was presented in the later case of *State v. Gustafson*, *supra*, as an examination of the record and briefs in that case discloses, and we there again held sufficient an information in every material particular the same as that in the *Rowan* case and as that here. It is a general rule that an information charging a statutory crime, substantially in the language of the statute defining the crime, is sufficient, if thereby the accused is adequately advised of the cause of the accusation against him. Joyce, Indictments, § 371, p. 415; *State v. Schuman*, 89 Wash. 9, 153 Pac. 1084; *State v. Lewis*, 42 Wash. 672, 85 Pac. 668. The information here meets this criterion. On the authority of the *Rowan* and *Gustafson* cases, we hold it sufficient.

The judgment is affirmed.

MORRIS, C. J., MAIN, and HOLCOMB, JJ., concur.

CHADWICK, J. (concurring)—I concurred in the case of *State v. Rowan*, 84 Wash. 158, 146 Pac. 374, and I concur in this opinion, but my concurrence is based not so much on

the argument and reasoning employed by the court in the two cases as upon what I conceive to be the deeper reason and the sounder principle, which I shall undertake to briefly state. The habitual criminal statute does not require a charge of a substantive crime. The sufficiency of the original information, the facts necessary to sustain a conviction, and the ordinary rules governing pleadings in criminal cases have no application whatever. When the prosecuting attorney has charged, by simple reference to the judgments, that a party has been convicted three times, he has done all that the law requires, for it is not a question of guilt or innocence, but merely a question involving a state of the record, either in the court where the charge is made, or some other court. It is necessary, when pleading a judgment, to say no more than that a judgment (describing it) was rendered in a certain court at a certain time. The only plea open to one so charged is that of *nul tiel record*, or that the judgment has been satisfied in some way recognized by the law.

Wherefore, if this reasoning be sound, our opinion should be sustained by reference to the rules of pleadings in civil actions rather than by reference to either the statutes or the rules of the common law for measuring the sufficiency of indictments and informations. I would prefer to place my vote for affirmance upon this ground.

[No. 13366. Department One. January 2, 1917.]

THE STATE OF WASHINGTON, *on the Relation of H. W. Peel et al., Plaintiff*, v. C. W. CLAUSEN, *as State Auditor, Respondent.*[1]

EMINENT DOMAIN — COMPENSATION — APPORTIONMENT BETWEEN MORTGAGOR AND MORTGAGEE. Where the state condemned land for a state road, without making the mortgagees parties as it might have done, and an award was entered in favor of the owners, the state must pay the award to the owners before taking possession, notwithstanding the fact that the mortgagee had purchased at a subsequent foreclosure sale and had quitclaimed to the state, subject to redemption; since the award, unappealed from, is conclusive on the subject of title, as between the parties, and the question of apportionment between mortgagor and mortgagee is immaterial.

SAME—PAYMENT OF COMPENSATION—PROCEEDINGS—STATUTES—LIABILITY OF STATE ON TAKING POSSESSION. Rem. Code, § 900, providing that in eminent domain proceedings the attorney general "shall" file with the state auditor a certificate setting forth the amount of the award against the state, and making it the duty of the auditor to draw a warrant therefor, leaves it discretionary with the attorney general to file the certificate, as the state may abandon the proceedings before taking possession if the award is unsatisfactory; hence § 900 does not conflict with the earlier act, Id., § 889, providing that no execution shall issue against the state on any judgment.

SAME—PAYMENT OF COMPENSATION—PROCEEDINGS—PARTIES. The state having taken possession of lands before paying the award, and refused to avail itself of Rem. Code, § 900, authorizing an abandonment of the proceedings, it cannot escape liability for the amount of the award, and the attorney general is therefore not a necessary party to a proceeding to compel the state auditor to issue a warrant for the amount due, which under § 900 he was to issue upon the attorney general's certificate.

SAME—PROCEEDINGS—PLEADING AND PROOF. Where the state took possession of condemned lands before paying the award, in violation of Const., art. 1, § 16, requiring compensation to be first made, the law presumes that the state is prepared to pay the award, and the burden is not upon the claimant to allege or prove the state of the public fund.

STATES—FUNDS—APPROPRIATIONS—FORM. Neither Const., art. 8, § 4, providing that no money shall be paid out of the treasury except

[1]Reported in 162 Pac. 1.

in pursuance of an appropriation by law, nor Rem. Code, § 9008, prohibiting the state auditor from issuing any state warrant unless there is a law authorizing the issue of the same, requires that an appropriation of moneys shall be in any particular form of words, but the same may be made by a general act clearly showing the legislative intent.

EMINENT DOMAIN—PAYMENT OF COMPENSATION—APPROPRIATION—NECESSITY—STATUTES. A specific appropriation by the legislature to pay awards in condemnation proceedings is not contemplated or necessary to authorize the state auditor to issue a warrant therefor, under the eminent domain act of 1891, entitled an act to regulate the mode of appropriating land and prescribing the method of making compensation, which provides (Rem. Code, §§ 896, 897) that the decree of appropriation shall vest legal title in the state, that the decree shall be recorded and that the state may make payment of the damages by depositing the same in court; especially in view of Id., § 900, providing for the payment of awards by the issuance of state warrants; since it is no defense to an action to secure a warrant that a special fund provided for the payment of awards had been exhausted.

SAME—COMPENSATION—PAYMENT—STATUTES. Rem. Code, § 5872, providing that the cost of a right of way for a state road acquired by the highway commission shall be paid for from the fund apportioned to such state road does not make that method exclusive, or repeal the provisions of the general eminent domain act which applies where the road fund has been exhausted and the state had taken possession of land and put it to a public use without making compensation.

Application filed in the supreme court March 6, 1916, to compel the state auditor to issue a warrant in payment of an award in proceedings to condemn a right of way for a state road. Granted.

H. W. Canfield and *Troy & Sturdevant*, for relators.

The Attorney General and *R. E. Campbell, Assistant*, for respondent.

CHADWICK, J.—The state, in the prosecution of its highway extensions, brought suit against the relators to condemn a right of way over certain lands owned by them in Spokane county. A jury returned a verdict in favor of relators for the sum of $1,026, and costs taxed at $125.40. Prior to the

time the judgment was entered, the Pennsylvania Mortgage Company had brought a proceeding to foreclose a mortgage upon relators' lands and had caused the lands to be sold at sheriff's sale to satisfy the decree. The company became the purchaser at the sale, and now holds the legal title subject to redemption.

Pending the entry of the judgment in the eminent domain proceedings, an agent of the state had obtained a quitclaim deed from the mortgage company for the right of way. This deed is held in escrow pending a possible redemption. After the entry of the judgment in favor of the relators, the state took possession of the right of way and has cleared, graded, and graveled and is maintaining a roadway upon it. The state has not paid the amount of the judgment and costs into court, or any part thereof, although repeatedly requested so to do. Relators have brought this proceeding to compel the issuance of a warrant in payment of the judgment. Respondent has demurred to the petition, setting up the several legal defenses that relators have no interest in the subject-matter, that there is a defect of parties defendant, and that there is no allegation in the petition showing that there is a fund upon which the warrant can be drawn and out of which it can be paid.

I. *Interest in the subject-matter.* The objection that the mortgagee is the owner of the land, and entitled to the award as against relators, or that the state is not bound by the judgment on account of the deed, is not tenable. The *Attorney General* supports his contention by reference to § 602 of the code, and the following cases: *Hardy v. Herriott*, 11 Wash. 460, 39 Pac. 958; *Dane v. Daniel*, 23 Wash. 379, 63 Pac. 268; *McManus v. Morgan*, 38 Wash. 528, 80 Pac. 786; *Merz v. Mehner*, 67 Wash. 135, 120 Pac. 893.

As between the mortgagor and the mortgagee holding subject to redemption, the question of ownership may be material and should be determined when the fund paid for the taking of the property is distributed, but a judgment debtor

cannot question, in a collateral way, a judgment once entered in favor of a particular party and not appealed from.

The state has had the value of the land taken assessed by a jury, and it is bound to pay that value, unless the payment is waived by those who are entitled to it. The apportionment of the fund between the relators and the mortgagee is a matter of no interest to the state. Neither is it sufficient to say that, if there is no redemption, the state can take the deed from the mortgage company and permit the judgment to go unsatisfied. It being the duty of the state, under the constitution, to pay the award, the mortgagee could not, under the record, disclaim the award if it would. Nor can the state now deal with the mortgagee as the owner. It brought its action against relators alone, and had a judgment entered in their favor. The mortgage company had notice of the eminent domain proceeding, and the state had notice of the mortgage. It does not appear that the state tendered any issue as to ownership; nor was an appeal taken from the judgment. The state could have purged itself of all questions of ownership and distribution of the award by doing what the statute requires, that is, by making the mortgagee a party or by paying the award into court, at the same time calling the attention of the court to the state of the title and the necessity of an order distributing the fund.

The cases of *North Coast R. Co. v. Hess*, 56 Wash. 335, 105 Pac. 853, *Carton v. Seattle*, 66 Wash. 447, 120 Pac. 111, and *State ex rel. Long v. Superior Court*, 80 Wash. 417, 141 Pac. 906, do not bear in favor of respondent. On the contrary, they hold, in so far as they bear at all, that a petitioner in a condemnation proceeding can, by following the statute, take the land without assuming the burden of distributing the fund. But, inasmuch as the state has paid nothing into court, and there is no showing that the mortgagee is claiming any part of the award as against the judgment creditors, it is idle to further discuss this phase of the case.

II. *Defect of parties.* Relators rely upon Rem. Code, § 889:

"No execution shall issue against the state on any judgment, but whenever a final judgment against the state shall have been obtained in any such action, the clerk shall make and furnish to the auditor of state a duly certified transcript of such judgment; and the auditor of state shall thereupon audit the amount of damages and costs therein awarded, and the same shall be paid out of the state treasury." [L. '95, p. 188, § 4.]

The *Attorney General* relies upon the eminent domain statute, Rem. Code, §§ 891-900, wherein it is provided that, after an award is made, the *Attorney General* shall file a certificate with the auditor. Section 900 follows:

"Whenever the attorney general shall file with the auditor of this state a certificate setting forth the amount of any award found against the state of Washington under the provisions of this act, together with the costs of said proceeding, and a description of the lands and premises sought to be appropriated and acquired, and the title of the action or proceeding in which said award is rendered, it shall be the duty of the state auditor to forthwith issue a warrant upon the state treasury to the order of the attorney general in a sum sufficient to make payment in money of said award and the costs of said proceeding, and thereupon it shall be the duty of said attorney general to forthwith pay to the clerk of said court in money the amount of said award and costs." [L. '91, p. 143, § 10.]

It is contended that the *Attorney General* is a necessary party.

At the argument, we were inclined to the belief that there might be some conflict between §§ 889 and 900. After a more careful consideration, we find no conflict. Each has its place. The application of either will depend upon the record. Art. 1, § 16 of the constitution provides that land shall not be appropriated to a public use unless its value is first ascertained and paid into court for the owner. We have held that a condemner, if dissatisfied with the award, is not bound to

pay the judgment and take the property. *Port Angeles Pac. R. Co. v. Cooke*, 38 Wash. 184, 80 Pac. 305; *State ex rel. Struntz v. Spokane County*, 85 Wash. 187, 147 Pac. 879; Lewis, Eminent Domain, § 955; 1 Elliott, Roads & Streets, § 307.

The holding that title would not pass until the award had been paid into court in satisfaction of the judgment, followed. *North Coast R. Co. v. Gentry*, 73 Wash. 188, 131 Pac. 856; *Port of Seattle v. Yesler Estate*, 83 Wash. 166, 145 Pac. 209. Section 900 means no more than that the claimant in a condemnation proceeding can assert no rights in the judgment. His right of payment, as well as the right of the state to take possession of the land for public uses, is made dependent upon the certificate of the *Attorney General*. The act of the *Attorney General*, notwithstanding the use of the word "shall," is one of discretion. If the award is not satisfactory, the state can abandon the proceeding. If it is satisfactory, the *Attorney General* can file his certificate, whereupon a warrant is drawn to his order and, upon the payment of the judgment, title will pass.

But the state is in no position to invoke this statute. It has ignored the privileges of the chapter upon which it relies, and, by taking actual possession of the right of way in defiance of the constitution, has made itself subject to the money judgment which was entered against it in the original case. The purpose of § 900 was to permit the state to repudiate a judgment in a condemnation proceeding. Having taken the land, it has waived the right to repudiate, and is, in law, charged with its value.

In the interest of public policy, this court has held that the state or a municipal corporation, or a corporation exercising the privileges of the sovereignty, will not be ousted if it has wrongfully taken possession of the land and is, in fact, devoting it to a public use. The owner will be left to his remedy at law to recover damages. The cases are collected in *Domrese v. Roslyn*, 89 Wash. 106, 154 Pac. 140. The corol-

lary of the cases cited should be equally well settled in principle; that is, if a petitioner has determined the value of the land prior to the time possession is taken, it cannot find protection by urging the omission of some duty imposed upon it by the eminent domain statutes, but must answer the money demand of the judgment.

III. *The burden of pleading and proving a solvent fund.*

The burden is not upon relators to plead the state of the public fund. The state, through its officers, has taken relators' property and put it to a public use in defiance of the constitutional limitations upon its power to take without first making just compensation. Const., art. 1, § 16. Having failed in its duty to the citizen, the law will presume that it is prepared to pay the value of the property taken, when called upon to do so. So much for the pleading.

We announced our decision in this case some time ago. We directed that the writ should issue. Whereupon—notwithstanding a stipulation theretofore entered into by counsel that, in the event the demurrer should be overruled and the writ issued, it should direct the respondent to pay the money into the registry of the superior court of Spokane county to be paid out under the order of that court—counsel for respondent came in and announced that the special fund (provided for the highway, which is laid in part over relators' land) had been exhausted and paid out by respondent pending a hearing upon relators' petition; that there is no contingent appropriation out of the general fund for the payment of judgments against the state; that, in the absence of such appropriation, respondent cannot issue a warrant against the general fund without violating the provisions of art. 8, § 4, of the constitution:

"No money shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within two years from the first day of May next after the passage of such appropriation act, and every such law making a new appropriation, or

continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum;"

and Rem. Code, § 9008, which provides:

"The state auditor shall, in no case issue any state warrant unless there is a law authorizing the issue of the same, and every warrant shall state the act under which it is drawn; and if any state auditor shall issue any state warrant not authorized by law, he shall forfeit and pay fourfold the amount of such order to the state to be recovered by action against the auditor and his sureties on his official bond."

But we think that relators are not to be denied their remedy because of the unlawful appropriation of their land, or the defiant waste of any part of the highway fund.

The object of the constitution art. 8, § 4, and the statute cited, is to prevent expenditures of the public funds at the will of those who have them in charge, and without legislative direction.

"Its object is to secure to the legislative department of the government the exclusive power of deciding how, when, and for what purposes the public funds shall be applied in carrying on the government (2 Opinions Attorneys-General, 670). It had its origin in Parliament in the seventeenth century, when the people of Great Britain, to provide against the abuse by the king and his officers of the discretionary money power with which they were vested, demanded that the public funds should not be drawn from the treasury except in accordance with express appropriations therefor made by Parliament." *Humbert v. Dunn*, 84 Cal. 57, 24 Pac. 111.

It is well understood that these provisions—and they are common to most, if not all, of our written constitutions—are mandatory, and that no moneys can be paid out without the sanction of the legislative body. The legislative intent must be certain. It is not to be disclosed by a construction of doubtful acts or ambiguous language. But it does not follow that an appropriation need be in any particular form or words.

"It is sufficient if the legislative intent to make an appropriation clearly appears, expressly or by implication, from the terms of the statute." 36 Cyc. 892.

So it is held, where a law creates an office, no special appropriation is necessary to authorize the issuance of a warrant for the payment of a salary fixed by the terms of the act. This very question was before the court in *State ex rel. Brainerd v. Grimes*, 7 Wash. 191, 34 Pac. 833. The legislature had created an office, fixed a salary, and provided that it should be paid monthly, the same as the salaries and expenses of the other state officers are paid, and directed the auditor,

". . . to issue his warrants for . . . the payment of the salaries of the members of the said board; and the treasurer of state is hereby directed to pay the same out of any moneys in the state treasury not otherwise appropriated."

The officer brought mandamus to compel the issuance of a warrant for his monthly salary. The auditor defended, setting up that no appropriation had been made, as in fact, none had been made, either by special or general appropriation bill. The respondent relied, as here, upon art. 8, § 4, of the constitution. The court held:

"It is evident that the legislature construed the act under consideration as embodying an appropriation for the purpose of carrying the act into effect, for the bill is entitled 'An act to provide for the creation of a state board of land commissioners for the management and disposition of the public lands of the state, making appropriations therefor, and declaring an emergency.' But, outside of any light which may be thrown upon the intention of the law-makers by aid of the title, we are clearly of the opinion that the language employed in the body of the act is amply sufficient to show that the intention of the legislature was to appropriate. They have designated the amount, and have directed that it be paid out of any moneys in the state treasury not otherwise appropriated. This, we think, is sufficient, and the appropriation contemplated by the constitution is as plainly indicated as though the formal words 'there is hereby appropriated' etc.,

were used. No arbitrary form of expression is dictated by the constitution, and none should be required. Many cases have been adjudicated in states having substantially the same constitutional provision as the one in question, and so far as we have been able to ascertain they have uniformly been determined in favor of the relator's contention. See *State of Louisiana v. Bordelon*, 6 La. Ann. 68; *Humbert v. Dunn*, 84 Cal. 59, 24 Pac. 111, and cases cited."

See, also, *Carr v. State ex rel. Coetlosquet*, 127 Ind. 204, 26 N. E. 778, 11 L. R. A. 370; Id., 22 Am. St. 624, where many authorities are collected.

It was held in *Campbell v. Board Com'rs of State Soldiers' & Sailors' Monument*, 115 Ind. 591, 18 N. E. 33:

"There may be an appropriation of public moneys to a given purpose without in any manner designating the act as an appropriation."

The legislature, by the act of 1891, recognized the necessity of taking private property for public use by the state, and without those delays that might attend such proceedings if no way to meet the award were presently provided. It therefore undertook to devise a prompt and efficient procedure—a law that would not delay the state in its purposes and, at the same time, afford full protection to the property owner in the right guaranteed by the constitution, that is, that his property should not be taken without just compensation paid to him, or into the registry of the court, for his use. The act is a part of chapter V, Rem. Code. It is there provided:

"At the time of rendering judgment for damages, whether upon default or trial, the court or judge thereof shall also enter a judgment or decree of appropriation of the land, real estate, or premises sought to be appropriated, thereby vesting the legal title to the same in the state of Washington. Whenever said judgment or decree of appropriation is made, a certified copy of such judgment or decree of appropriation may be filed for record in the office of the auditor of the county where the said land, real estate, or other prem-

ises are situated, and shall be recorded by said auditor like a deed of real estate, and with like effect." Rem. Code, § 896.

"Upon the entry of judgment upon the verdict of the jury or the decision of the court or judge thereof, awarding damages as hereinbefore prescribed, the state of Washington may make payment of the damages assessed to the parties entitled to the same, and of the costs of the proceedings, by depositing the same with the clerk of said superior court to be paid out upon the direction of the court or the judge thereof . . ." Rem. Code, § 897.

See, also, § 900, *supra.*

Aside from the body of the act, with all its pregnant meaning and wealth of fairness, we may look, with profit, to the title of the act of 1891, as did the court in the case of *State ex rel. Brainerd v. Grimes, supra,* when it resorted to the title of the act there considered. It is:

"An act to regulate the mode of proceeding to acquire and appropriate land, real estate and other property for public uses of the state of Washington, and prescribing the method of ascertaining and making compensation therefor, and declaring an emergency." Laws 1891, p. 138.

Clearly this act is intended as an aid to the sovereignty of the state, if not, indeed, one resting in the very necessities of the state. For, like its creatures, when the state engages in public service, it is without power to take property without first making compensation therefor. To make compensation, the amount thereof must be first ascertained. To hold that the legislature intended that the state should bring its action, have damages awarded, and then either call a special session of the legislature to make an appropriation, or await the action of the next legislature, would negative the implications, if not the express words of the act. The only fair and reasonable construction to be put upon the act is that the legislature intended that all judgments awarded in condemnation proceedings should be paid presently so that the state might not be hampered in the exercise of the functions which pertain to sovereignty.

To hold otherwise would put it in the power of the state to appropriate private property at will, and leave the shorn citizen to the chilling comfort of legislative indifference; for if there be no appropriation to satisfy the state's invasion of relators' property, no power on earth could compel the legislature to pass upon or allow a claim, however just it might be. In other words, if the law be not so, it is within the power of the officers of the state, by affirmative act, and in the power of the legislature, by nonaction, to annul the constitution.

In principle, there is no difference between the case of *State ex rel. Brainerd v. Grimes*, *supra*, and the case at bar. In the one, the legislature created an office, fixed a salary, and directed that the officer be paid for services rendered. There was no specific appropriation. In the case at bar, the legislature has authorized the taking of private property when necessary for the public use. Such necessity is not to be determined arbitrarily by the administrative officers, but is reserved by the constitution as a judicial question, and is to be adjudged only after a hearing. The constitution has said that property shall not be taken without compensation first paid for its use. The state has, arbitrarily and in defiance of this constitutional right, taken the property of relators. The legislature has provided the manner of payment, and from whence the compensation is to be paid. The state is under obligation to do that which it should have done before taking possession, that is, to tender a warrant upon the treasury.

In our discussion, it will be borne in mind that the state is not treated as a tort feasor, but as a contract creditor to be held to an observance of "the same rules of conduct as it insists upon in the citizen when dealing with his fellows. The same obligation to do justice rests upon it as rests upon an individual." *State ex rel. Maddaugh v. Ritter*, 74 Wash. 649, 134 Pac. 492.

It may be contended that if ch. V, Rem. Code, is in fact a continuing appropriation of money to meet such cases as this, that it is void because the amount is left uncertain.

"It was not necessary to the payment of appellees' claim that there should first be a specific appropriation by the legislature for its payment. The general assembly has spoken concerning such claims in plain language, as follows: 'And the auditor of state shall thereupon audit the same as a claim against the treasury, and the treasurer of state shall pay the same out of any money not otherwise appropriated." *Hart v. State ex rel. Hite* (Ind.), 64 N. E. 854, 58 L. R. A. 949.

See, also, *Humbert v. Dunn*, 84 Cal. 57, 24 Pac. 111; *People ex rel. Becker v. Miner*, 46 Ill. 390.

There are very substantial reasons for these holdings. We have adverted to the necessity for undelayed action when the state is engaged in the exercise of its functions, and to meet such contingencies, it may be readily inferred that the legislature had in mind the constitutional provisions that no property shall be taken unless the necessity for so taking had been determined by a court of competent jurisdiction; that, when the necessity is adjudged, the officers of the state should proceed without delay to submit the matter of an award to a jury, and then, if the award be fair, make immediate payment. In other words, the legislature made a general act to cover all cases arising where the state, in the interim between legislative sessions, found it necessary to take private property for a public use.

We have not overlooked Rem. Code, § 5872, which authorizes the highway commissioner to

"Acquire right of way . . . by gift, purchase or condemnation . . ." and provides that: "The cost of such right of way shall be paid for from the fund apportioned to the state road for which such right of way is acquired."

We have examined the several state highway acts and find no purpose of the legislature to repeal any of the provisions

of the eminent domain act, or to limit the right of a citizen whose property has been arbitrarily taken by the state for its uses. While § 5872 provides that the cost of a right of way shall be paid for from the fund apportioned to the state road for which such right of way is acquired, it does not, in terms, make that method exclusive. It is fundamental that a constitutional right will not be denied or abridged by implications arising out of some statute. This must be so, for the power to take is not granted by, nor does it depend upon, the law of which § 5872 is a part, nor upon the constitution. It rests in the sovereignty of the state. *Gasaway v. Seattle*, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68.

Under the admitted facts of this case, having reference to the constitution as well as the law, § 5872 means that an owner of property taken for a public use shall be paid out of the highway fund, but it does not follow, if there be no such fund or if it has been exhausted, that he is to go without that compensation which the constitution guarantees to him and which may be paid under the eminent domain act. Albeit, if the state had not taken possession of relators' property, and put it to a public use, we might not compel the issuance of a warrant upon a showing that the auditor had misappropriated the highway fund.

Any other conclusion would, under the facts of this case, compel a holding that the act creating the office of highway commissioner is unconstitutional in so far as it undertakes to limit the mode or method of compensating a landowner whose property had been abitrarily taken and put to a public use.

It is the order of the court that the demurrer of respondent be overruled, and that the writ issue directing that a warrant be drawn for the amount of the award and costs, together with legal interest from the time the judgment was entered in the court below.

MORRIS, C. J., ELLIS, and MOUNT, JJ., concur.

[No. 13714. Department One. January 2, 1917.]

In the Matter of the Contempt of Court of J. E. WILLIS.[1]

CONTEMPT—APPEAL—REVIEW—RECITALS—PRESUMPTIONS. Upon appeal from a judgment of contempt of court committed in the presence of the court, the facts recited in the judgment are taken as true.

SAME—WHAT CONSTITUTES. To circulate a pamphlet in the court room reflecting upon the trial judge and to interrupt the proceedings in an insolent manner constitutes contempt of court in the view and presence of the court, under Rem. Code, § 1049.

SAME — SUMMARY JUDGMENT — JURISDICTION — DELAY IN ENTRY. Jurisdiction attaches immediately to punish for a contempt committed in the view and presence of the court; and where the offender left the room before he could be apprehended by the sheriff, and was brought into court the next day, a delay of one day in entering the order is not unreasonable or sufficient to divest the court of jurisdiction.

SAME—SUMMARY JUDGMENT—NECESSITY OF HEARING. Where a contempt is committed in the view and presence of the court, summary punishment without a hearing, as authorized by Rem. Code, § 1051, violates no constitutional rights.

SAME—SENTENCE—EXCESSIVE PUNISHMENT. For a contempt of court committed by an attorney by circulating a pamphlet reflecting on the trial judge while the court was in session and by repeatedly interrupting the proceedings, punishment by a fine of $300 and three months' imprisonment in the county jail is excessive, and should be reduced to $100 and 24 hours in jail.

Appeal from an order of the superior court for Lewis county, Rice, J., entered April 4, 1916, adjudging defendant guilty of contempt of court. Modified.

Miller & Lysons, for appellant.

C. A. Studebaker and *W. O. Grimm*, for respondent.

J. E. Willis, in propria persona.

MAIN, J.—The defendant, J. E. Willis, appeals from an order of the superior court adjudging him guilty of con-

[1]Reported in 162 Pac. 38.

tempt committed in the view and presence of the court, and fixing the penalty. The order, omitting the formal parts, is as follows:

"Be it known, That on the 3rd day of April, 1916, the above named court being in open session in the court room in Chehalis, Washington, and having under consideration various motions and court matters of public concern, the said J. E. Willis, above named, being then a member of the bar of said court and practicing his profession before said court, appeared in the court room of said court, while so in open session, in a defiant and contemptuous manner, then having with him certain pamphlets or documents, a copy of which is marked Exhibit "A" and made part of the record of these proceedings; and the said J. E. Willis did then and there proceed to circulate said pamphlets in said court room in the immediate presence of the judge of said court while said court was in open session and transacting public business as aforesaid, and the said J. E. Willis holding and exhibiting said pamphlets in such a manner as to make it impossible that the judge of said court, being Alonzo E. Rice, could avoid seeing and recognizing the said pamphlets, which said pamphlets contained matters highly insulting to and contemptuous of the said court, and the judge thereof.

"That during such proceedings in court, as then being held, the said J. E. Willis, in a contemptuous, disorderly and insolent manner, so circulated the said pamphlets in said court room and did then and there attempt to pass and hand to members of the bar, then present before said court, and did actually deliver one copy thereof to one member of the bar, then present; that thereupon the court directed said member of the bar who had received the pamphlet to pass it up to the court, which was done, and the court thereupon recognized said pamphlet, which is entitled, 'The Crimes and Misdemeanors of Hon. Alonzo E. Rice,' purporting to be written by the said J. E. Willis, which document or pamphlet was thereupon passed by the court to the clerk and is the identical document which is herein referred to as Exhibit "A"; that said J. E. Willis did further frequently interrupt the court in matters in which he, the said Willis, was not concerned, and did then and there endeavor to interrupt, and did interrupt, the judicial proceedings then being had

by attempting to engage the judge of said court in an altercation with him, the said J. E. Willis, and at such time and place the said J. E. Willis did rise to his feet in a contemptuous and insolent manner, and did then and there interrupt the court by using the following language: 'If you have anything to do or say to me, do it, don't threaten it.'

"That the manner of the said J. E. Willis in so conducting himself was contemptuous and tended to humiliate and embarrass the court in its proceedings, and to disgrace the said court in the eyes of the members of the bar then present, and by his conduct he did interrupt and cause to be suspended the judicial proceedings in which the court was then engaged as aforesaid, by his attitude of interruption, and defiance.

"That immediately after the said J. E. Willis had used the language above quoted, the court informed him that it was then considering other matters and for him to be seated and to be quiet, but in open defiance of such request the said J. E. Willis used the following language: 'Is that a threat you make?' 'Is the court in session?' 'Has the court adjourned?' 'Has the court adjourned?' 'I ask that a record be made of this,' at the same time exhibiting in his hands the documents above referred to a copy of which is marked Exhibit "A," and the court was thereby interrupted in its judicial proceedings then being held, and that the said Willis by his said conduct then and there gave the court to understand, and the members of the bar present to understand, that he proposed to address the court concerning such pamphlets and their contents; whereupon the court was compelled to and did send for the sheriff of said county to preserve order in said court, but before the said sheriff could arrive, and before the said court, or the judge thereof, could enforce any order or judgment of contempt against the said J. E. Willis, he departed from the court room without apology or excuse.

"Be it further remembered that on this 4th day of April, 1916, the court having fully considered all the matters and things hereinabove related, did cause the said J. E. Willis to appear in person before this court, and did thereupon briefly recite to the said J. E. Willis the reasons of the court for so doing and did thereupon and while the said J. E. Willis was present in court announce that the said J. E. Willis was guilty of contempt of this court by reason of the matters and

things above set forth and did announce sentence as hereinafter set forth.

"It is therefore the judgment of this court, and it is adjudged that said J. E. Willis is guilty of contempt of this court and that he be fined, and required to pay the sum of three hundred dollars, as and for contempt of court, and in addition thereto, that said J. E. Willis be sentenced and he is hereby sentenced to serve ninety days in the county jail of Lewis county, Washington, and he is hereby remanded to the custody of the sheriff of Lewis county, Washington, until such sentence is served and such fine is paid, or, if such fine be not paid, then that he be kept in the county jail as aforesaid for such period, in addition to such 90 days, until such fine has been extinguished by confinement in such jail at the statutory per diem in such cases provided for."

This order was made and entered on April the 4th, 1916. The facts, as stated in the order, must be here accepted as true. In *State v. Buddress*, 63 Wash. 26, 114 Pac. 879, it was said:

"The law is well settled that, in hearing cases upon appeal, for contempt committed in the presence of the court, the facts recited in the order are taken as true, and no other or different facts will be considered."

The first assignment of error is that the facts did not constitute contempt. It seems reasonably plain from the facts recited in the order that, on April 3d, 1916, the date on which the contempt is charged to have been committed, the appellant, an attorney at law, went to the court room, where the Honorable A. E. Rice was presiding as judge, for the purpose of circulating a pamphlet purporting to have been written by himself, and entitled "The Crimes and Misdemeanors of Hon. Alonzo E. Rice," and for the purpose of engaging the trial judge, while court was in session, in an altercation. It does not appear that the appellant, on this occasion, had any business before the court or appeared therein in any matter then pending. While the business of the court was being conducted, the appellant repeatedly interrupted the course of the proceedings, holding the pam-

phlet in his hands so that it could be seen and observed by the trial judge, and attempted to, and did in fact, circulate the pamphlet in the court room. If the facts stated in the order are true, it requires no argument to show that the appellant's conduct was contemptuous, and his behavior insolent toward the trial judge while holding court, and tended to interrupt the due course of judicial proceedings. This, under Rem. Code, § 1049, constituted contempt in the view and presence of the court. It is said in the appellant's brief that, as a citizen, he had a right to be in the court room. This is undoubtedly true, but neither as a citizen nor as an attorney did he have a right to engage in contumacious conduct toward the trial judge while the court was in session.

The second assignment of error is that, since the contempt was committed on April 3d, the court had no power to summarily punish on April 4th, the day following. The order recites that, after the trial judge directed that the sheriff be called into the court room, the appellant left the court room before the arrival of the officer. On the day following, at the direction of the court, the sheriff brought the appellant into court, where he was summarily found guilty of contempt committed on the day previous, and the order above set out entered. The law is that, when a contempt is committed in the view and presence of the court, jurisdiction of the person of the offender attaches immediately upon the commission of the contempt. *State v. Buddress, supra; Middlebrook v. State*, 43 Conn. 257, 21 Am. Rep. 650; *Ex parte Terry*, 128 U. S. 289. In the Connecticut case cited, the defendant, after committing the contempt in the presence of the court, and before the order was entered, fled from the jurisdiction. The trial judge, against whom the contempt was committed, entered the order nevertheless, adjudging him in contempt, which order was sustained by the supreme court of that state. In *Ex parte Terry*, the order was entered while the defendant was not in the court room, and the supreme court of the United States sustained the order. These cases both pro-

ceed upon the theory that jurisdiction attached immediately upon the commission of the contempt, and was not lost by the absence of the defendant. In the *Buddress* case, *supra*, the order was not entered until some days after the contempt was committed, and it was there said: "That jurisdiction was not lost by the delay in filing the order."

In the present case, it cannot be said that the defendant was prejudiced by the delay of one day in entering the order. On the day succeeding the contempt, the temper of the trial judge was, no doubt, not less favorable to the defendant than it would have been on the day previous. The defendant was ordered brought into court with reasonable promptness, and the delay of one day cannot be held either unreasonable or sufficient to divest the court of jurisdiction when it had once attached.

The next assignment of error is in entering the judgment without giving the appellant an opportunity to be heard in his own defense. It must be kept in mind that the appellant was guilty of contempt in the view and presence of the court, and that, in such cases, the statute, Rem. Code, § 1051, provides for summary punishment. By inflicting summary punishment, no constitutional right of the appellant was invaded. Upon this question, in *Ex parte Terry*, *supra*, the Federal Supreme Court, at page 313, used this language:

"We have seen that it is a settled doctrine in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed in the face of the court, at least one of superior jurisdiction, the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred; and that, according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public

and private rights, nor the officers charged with the duty of administering them. To say, in case of a contempt such as is recited in the order below, that the offender was accused, tried, adjudged to be guilty and imprisoned, without previous notice of the accusation against him and without an opportunity to be heard, is nothing more than an argument or protest against investing any court, however exalted, or however extensive its general jurisdiction, with the power of proceeding summarily, without further proof or trial, for direct contempts committed in its presence."

Cases which deal with a contempt not committed in the view and presence of the court are not in point when the defendant is charged with a contempt in the presence of the court. *State v. Nicoll*, 40 Wash. 517, 82 Pac. 895, and *McClatchy v. Superior Court of County of Sacramento*, 119 Cal. 413, 51 Pac. 696, 39 L. R. A. 691, are both cases where the contempt was not committed in the presence of the court. Therefore, what is said in those decisions is not relevant to the facts in this case.

The last assignment of error is that the punishment inflicted is excessive and unreasonable. In this proceeding, the appellant could not be called upon to answer for the publication of the pamphlet, because this did not occur in the presence of the court; neither could he be called upon to answer for its circulation not in the presence of the court. The only contumacious conduct for which the appellant could, in this proceeding, be punished was his conduct in the court room on April 3d, while the court was in session, and this consisted in the circulation of the pamphlet, and repeated interruptions of the court, when the appellant had no business to call to the court's attention. But, in determining what would be a proper punishment, sight must not be lost of the fact that the appellant's conduct was deliberate. It is not one of those cases where an attorney, in the heat and excitement of a trial, may so far forget himself as to overstep the bounds of propriety, and transgress proper judicial decorum.

In our opinion, the appellant's conduct merits a fine of one hundred dollars, and imprisonment in the county jail for a period of twenty-four hours' time.

The cause will be remanded, with direction to the superior court to modify the judgment by inserting therein the sum of one hundred dollars, instead of three hundred dollars, as specified in the order, and by inserting in the order twenty-four hours in the county jail of Lewis county, Washington, instead of ninety days.

MORRIS, C. J., CHADWICK, PARKER, and ELLIS, JJ., concur.

[No. 13626. Department Two. January 3, 1917.]

C. F. SULLIVAN, *Respondent*, v. CHARLES PORTER *et al.*, *Appellants*.[1]

JUDGMENT—RECITALS—PERSONS CONCLUDED — EVIDENCE — BURDEN OF PROOF. Where, after judgment against a trust company holding the record title to lands, plaintiff obtained judgment against the trust company by confession declaring that it held the legal title as trustee for the plaintiff, the judgment, though not binding on the judgment creditors, is *prima facie* evidence of the fact of trusteeship, in an action brought by plaintiff against the judgment creditors to quiet his title, and it devolves upon the judgment creditors to show that the judgment was fraudulent as to them.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 17, 1916, upon findings in favor of the plaintiff, in an action to quiet title, tried to the court. Affirmed.

Englehart & Rigg and *Fletcher & Evans*, for appellants.

Guy E. Kelly and *Thomas MacMahon*, for respondent.

MOUNT, J.—This action was brought by the respondent to quiet his title to certain lands in Pierce county, and to

[1]Reported in 161 Pac. 1186.

remove a cloud therefrom. The complaint alleged that the respondent was the owner of the property, and that the defendants were asserting a claim therein adverse to the plaintiff, and that the defendants had no right, title or interest in the premises, or any part thereof.

For answer to the complaint, the defendants denied that the plaintiff was the owner of the property, and, as an affirmative defense, alleged that, on the 15th day of February, 1915, the defendants procured a judgment against the Tweedy Trust Company, a corporation, in Yakima county, in the sum of $4,557.33, together with interest and costs; that thereafter, on the 18th day of March, 1915, the defendants filed in the office of the clerk of the superior court of Pierce county an abstract of the judgment in that case; that, at that time, the Tweedy Trust Company was the owner of the lands in question; that, by reason of filing the said abstract, the defendants acquired a first and prior lien upon the real estate; that thereafter, with intent to defraud these defendants and render their judgment and lien valueless, the plaintiff in this action brought a suit against the Tweedy Trust Company to declare a trust, alleging therein that the plaintiff was the owner of the property. That the Tweedy Trust Company, in collusion with the said plaintiff, confessed judgment, and permitted judgment to be taken against the said Tweedy Trust Company, in order to establish said trust, and that the same was done without notice to these defendants and for the sole purpose of defeating the right of lien of the defendants; that the defendants had no knowledge or information that the plaintiff claimed any interest in the lands in controversy in this action. The defendants prayed to have the lien of the judgment of $4,557.33 declared a first lien upon the property.

For reply, the plaintiff admitted the filing of the abstract in Pierce county, and denied all of the other allegations in the affirmative defense.

Upon these issues, the case came on for trial to the court without a jury. The plaintiff introduced in evidence an abstract of title showing that the property was deeded on May 5, 1906, by one Rice, who was then the owner of the property, to the Tweedy Trust Company. Plaintiff then introduced in evidence, over the objection of the appellants, a certified copy of the judgment rendered in the case of the plaintiff against the Tweedy Trust Company on August 26, 1915, reciting that the TweedyTrust Company held the property in trust for the plaintiff, and the plaintiff was the owner thereof, and then rested. Defendants then moved for a directed judgment that the lien of their judgment be declared a prior and paramount lien. No other evidence was introduced. The court thereupon denied that motion and entered a judgment in favor of the plaintiff. Defendants have appealed.

The only question in the case is whether the judgment obtained by the respondent against the Tweedy Trust Company is evidence that the Tweedy Trust Company was a trustee, holding the property in trust for the plaintiff. It will be noticed that an abstract of the judgment in favor of the defendant and against the Tweedy Trust Company was filed in the auditor's office of Pierce county before the action was brought by the plaintiff against the Tweedy Trust Company to declare that company a trustee. It will also be noticed that the defendants were not parties to that action. They were not bound by that judgment, but it is clear, that, as between the Tweedy Trust Company and the respondent in this case, that judgment was binding and conclusive to the effect that the Tweedy Trust Company held the property in question in trust for the respondent. The defendants might attack it at any time. They did attack it in this case by alleging that the judgment was procured in fraud of the rights of the defendants and without their knowledge. We think the judgment was at least competent to prove *prima*

facie the fact therein stated, that the Tweedy Trust Company held the lands in question in trust for the respondent, and was not the owner thereof. While that judgment and the recitals therein were binding and conclusive as between the plaintiff and the Tweedy Trust Company, it was not conclusive upon these defendants, but was sufficient to show the facts recited in the judgment, and made a *prima facie* case to the effect that the Tweedy Trust Company was a trustee for the plaintiff in that action, the respondent in this. It devolved then upon the defendants in this action to show, as they had alleged in their affirmative answer, that the judgment was collusive and fraudulent as to them. No evidence was offered to show that fact. We are therefore satisfied that the trial court properly held that the judgment was sufficient to make a *prima facie* case in favor of the respondent.

The judgment appealed from is therefore affirmed.

MORRIS, C. J., FULLERTON, HOLCOMB, and PARKER, JJ., concur.

[No. 13319. *En Banc.* January 4, 1917.]

In the Matter of the Estate of Rebecca W. Cunningham. Fidelity National Bank of Spokane, *Appellant*, v. W. R. Cunningham, Senior, *as Executor*, *Respondent*.[1]

Witnesses—Competency—Transactions With Person Since Deceased—"Adverse" Party." Under Rem. Code, § 1211, excluding the testimony of a party in interest or to the record, as to transactions had with a party since deceased where the adverse party sues or defends as executor etc., an executor is an adverse party within the rule, in a proceeding brought by a creditor to compel the executor to inventory certain property as community property in order to satisfy community debts.

Same—Competency—Transaction with Person Since Deceased—Adverse Evidence. Upon an attempt by a creditor to subject the deceased's wife's property to a community debt, evidence by the executor and his son that the property was in one instance a gift from the son to the mother, and in another a gift from the husband to the wife and that no community funds entered into the transactions, is not evidence "adverse" to the estate, nor is it inadmissible as testimony of a party in interest as to any transaction had with or statement made to or by the deceased, within Rem. Code, § 1211, excluding such testimony; and the statute does not exclude testimony that is not "adverse."

Appeal from a judgment of the superior court for Adams county, Linn, J., entered November 1, 1915, upon findings in favor of the executor, in proceedings by a creditor to subject property to administration. Affirmed.

F. E. Langford, *Lucius G. Nash*, and *Adams & Naef*, for appellant.

Walter Staser and *C. H. Spalding*, for respondent.

Morris, C. J.—Appellant, as a creditor of the estate of Rebecca Cunningham, brought this proceeding to compel the executor to inventory certain property as community property in order to satisfy appellant's claim as a community

[1]Reported in 161 Pac. 1193.

debt, the basis of the petition being that the property was acquired during coverture and was community property, rather than the separate property of the deceased as claimed by the executor. Issues were framed as to the character of the property, and the lower court finding the same to be the separate estate of the deceased, this appeal was taken.

The character of the property depends largely upon the testimony of the executor and his son, and the error relied upon by appellant is the inadmissibility and incompetency of this testimony. The controlling statute is Rem. Code, § 1211, providing:

"No person offered as a witness shall be excluded from giving evidence by reason of his interest in the event of the action, as a party thereto or otherwise; but such interest may be shown to affect his credibility; Provided, however, that in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person, or as deriving right or title by, through, or from any deceased person, or as the guardian or conservator of the estate of any insane person, or of any minor under the age of fourteen years, then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with or any statement made to him by any such deceased or insane person, or by any such minor under the age of fourteen years: Provided further, that this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and who have no other or further interest in the action."

The executor was clearly an adverse party within the rule, and if his testimony, or that of the son, was adverse to the estate it was clearly inadmissible. The testimony of both the executor and the son was not, however, adverse to the estate, nor was either of them permitted to testify to any transaction had with or statement made to or by the deceased. The testimony was to the effect that the property was in the one instance a gift from the son to the mother; and in another a gift from the husband to the wife, made many years ago; that in neither case was any money or property advanced by

the deceased as a consideration for the gift, nor did any community funds or property enter into the transaction.

The evident purpose of this statute is to prevent those whom it covers from detailing any transaction with the deceased which it would be to the interests of the deceased if living to deny. This purpose has been expressed thus: death having closed the lips of one party, the law closes the lips of the other. The inhibition is for the benefit of the estate to shield it from the enforcement of claims that otherwise could not be defended against. It is not to be used as a sword to deprive the estate of beneficial evidence because death has deprived the estate of testimony that otherwise would be admissible. In other words, living mouths are closed when death prevents adverse testimony, but not when death only prevents confirmatory or supporting evidence. This was the view expressed in *O'Connor v. Slatter*, 46 Wash. 308, 89 Pac. 885, where, in interpreting this statute upon a like claim of error, it was said:

"From a careful consideration of the language of this statute and the object of its enactment, we conclude that it does not disqualify an interested witness on the part of the estate."

This language was used in sustaining the contention then made that the statute excludes only those witnesses whose testimony is adverse as to the estate of the deceased person. The *O'Connor* case was again before this court in 48 Wash. 493, 93 Pac. 1078. The former ruling was there adhered to, the court adding:

"The prohibition of the statute, however, extends only to transactions had by the appellant with the deceased or to statements made to the appellant by the deceased. It does not extend to every fact to which the deceased might testify if living."

A like view of this statute was voiced in *Nicholson v. Kilbury*, 80 Wash. 500, 141 Pac. 1043, where it was said:

"The statute means that a party in interest is not to make himself a vehicle to carry the words of his deceased adversary into the record of a contested proceeding."

These cases determine the rule. They are in line with the modern interpretation that statutes of this character should not be extended beyond their language when the effect of such extension will be to add to the list of those rendered incompetent as witnesses. *St. John v. Lofland*, 5 N. D. 140, 64 N. W. 930.

The judgment is affirmed.

HOLCOMB, MAIN, MOUNT, PARKER, and FULLERTON, JJ., concur.

[No. 13391. Department Two. January 4, 1917.]

THE CITY OF SEATTLE, *Appellant*, v. JOHN L. YOCUM, *Respondent*.[1]

WEIGHTS AND MEASURES—REGULATION — ORDINANCES — VIOLATION. A special contract for the sale of a commodity in bulk by gross weight, where the purchaser is not overreached or deceived, is not in violation of an ordinance which prohibits the sale of any commodity usually sold in bulk or quantity by weight or measure unless wrapped or measured on officially tested scales and unless the portion sold by weight or measure shall be the true net weight or measure which shall be plainly marked on the packages; since the purpose and intent of the ordinance is merely to protect the public from being defrauded by false weights and measures.

Appeal from a judgment of the superior court for King county, Ronald, J., entered January 17, 1914, upon an agreed statement of facts, dismissing a prosecution for the violation of a city ordinance upon appeal from a conviction in justice court. Affirmed.

Ralph S. Pierce and *James E. Bradford*, for appellant.

Palmer & Askren, for respondent.

[1]Reported in 162 Pac. 56.

HOLCOMB, J.—Respondent was prosecuted in the police court of Seattle for an alleged violation of an ordinance of Seattle regulating the inspection and sale of commodities in that city by weights and measures. He was convicted in that court and appealed to the superior court. The case was then tried on an agreed statement of facts, and respondent discharged. From such judgment, the city appeals.

The following are the agreed facts: The defendant, John L. Yocum, is the local manager of Swift & Company, wholesale dealers in meats in the city of Seattle, King county, Washington. Newman & Company are retail dealers in groceries and meats at 320 East Pike street, Seattle, and purchased for the purpose of reselling and not for personal consumption. On the 2d day of May, 1913, a city salesman of Swift & Company sold to Newman & Company twelve wrapped Premium smoked hams and twelve pieces of wrapped smoked Premium bacon.

Section 6 of ordinance No. 28,720 reads as follows:

"Sec. 6. That it shall be unlawful for any vendor, or his servant, agent or other employee, in the city of Seattle, to offer to sell, or sell, or sell and deliver, any commodity ordinarily and usually sold in bulk or quantity by weight or measure, unless the same be wrapped or measured as the case may be upon or by officially tested and approved weights, measures, scales, scalebeams, patent balances, steelyards, automatic or computing scales or other instruments for weighing or measuring, and unless that portion of such commodity so offered for sale or sold by weight or measure shall be true net weight or measure."

Section 23 of ordinance No. 28,720 reads as follows:

"Sec. 23. Any person guilty of violating any of the provisions of this ordinance shall, upon conviction thereof, be fined in any sum not less than five (5) dollars nor more than one hundred (100) dollars, or be committed to the city jail for a period of thirty (30) days, or may be both so fined and imprisoned."

Ordinance No. 28,720 was regularly passed by the city council of the city of Seattle on the 8th day of January, 1912,

and approved on the 10th day of January, 1912, and filed with the comptroller and *ex officio* city clerk on the 10th day of January, 1912, and was published January 13, 1912, and was and is of force and effect at all times since the last mentioned date. The gross weight of the twelve wrapped Premium hams was 149¾ pounds; the net weight of the twelve wrapped hams was 147½ pounds, and they were billed by Swift & Company to Newman & Company, the purchaser, at 149 pounds. The gross weight of the twelve pieces of wrapped Premium bacon was 82 pounds; the net weight of the twelve pieces of wrapped Premium bacon was 79¾ pounds, and they were billed by Swift & Company at 82 pounds. The hams and pieces of bacon were weighed upon the scales officially tested and approved by the department of public utilities of the city of Seattle. The twelve wrapped Premium hams and the twelve pieces of wrapped Premium bacon were ordered by Newman & Company, which well knew, at and before the time of purchasing the same, that it could only purchase Premium hams and Premium bacon wrapped. Prior to April 1, 1913, Newman & Company had received Premium hams and bacon unwrapped and since that date protested against purchasing Premium hams and bacon wrapped. There was no fraud or deception practiced by Swift & Company in the sale of the hams and bacon; it was the usual wholesale transaction; Newman & Company knew that it could purchase other brands of hams and bacon from Swift & Company at that time unwrapped. Premium hams and Premium bacon are especially selected from corn-fed hogs raised in the Mississippi Valley, slaughtered under the closest Federal inspection; in fact, each ham and each piece of bacon is inspected four times before it is sold to the trade; first, when it is slaughtered; second, while in the process of curing; third, when it is shipped from the packing house; and fourth, when it is smoked; they are mildly cured, and are wrapped in a special parchment paper to insure cleanliness, to preserve appearance, and to prevent shrinkage by evapo-

ration. Premium hams and bacon have been so wrapped and extensively advertised at a large expense annually for more than thirty years, to such extent that the trade generally knows the contents of a package so wrapped. Premium hams and bacon so wrapped are demanded by a very large percentage of the family trade. Premium hams and bacon are always ordered as so many hams and so many pieces of bacon, and the whole number are weighed, billed, and paid for, at an agreed price per pound. Accompanying this sale and all other sales, at the time of delivery, is an invoice which has printed on the back thereof the following:

SPECIAL NOTICE.

All shipments made at buyer's risk of damage in transit.

All lard in tins sold by the case, not by the weight.

Package meats, poultry and butter, including wrappers, are weighed when packed and constitute the subject of this sale; also back-sets and skewers are included in weight and constitute the subject of this sale.

No allowance made on goods sold on weight at time of packing for evaporation or moisture due to natural causes.

UNCANVASSED MEATS

OR MEATS THAT ARE SEWED IN MUSLIN BUT NOT WHITE-WASHED ARE NOT guaranteed against skippers. Canvassed whitewashed meats are guaranteed sound and free from skippers for thirty days from date of shipment.

FRESH MEATS AND SAUSAGES

are always shipped at buyer's risk of spoilage.

CLAIMS

No claims will be considered unless immediate notice is given us as soon as goods are received.

Such an invoice was delivered to and received by the purchaser, Newman & Company, before it had paid for the goods.

Premium hams and bacon are sold wrapped and the wrapper is included in the weight. The quantity of parchment paper, labels and twine used in wrapping a ham or piece of bacon, and the cost of labor, very nearly approximate the price charged per pound for the product. The weight of hams and pieces of bacon varies, owing to the size of the

animal at the time of slaughter. Hams vary in weight from six to forty pounds, and pieces of bacon vary from four to forty-five pounds. The weight of the sheets of paper used in wrapping Premium hams and bacon varies; different sheets of paper from the same bale vary in weight, and various sheets absorb more of the grease and moisture from the hams and bacon contained therein than do others, and it is impossible to determine the weight of a wrapped ham or piece of bacon at the time of sale without unwrapping. Two Premium hams were taken from the same car load and both were weighed immediately after taking them out of the smokehouse; number one weighed 10 pounds and 10 ounces, and was hung up unwrapped; ham number two weighed 10 pounds and 6¼ ounces, and was wrapped up in the customary Premium ham wrapper and hung at the side of ham number one. These hams were hung up June 7, 1913, and were again weighed on the 11th day of June, 1913. Ham number one lost two ounces; ham number two lost one-fourth of an ounce.

The trial court held that the respondent was not guilty, because the facts showed a special contract of sale between the seller of the commodities and the buyer and the ordinance did not prohibit such sale by special contract. The reasoning of the trial judge was fully set forth in a written opinion, and is as follows:

"The power to make a special contract between vendor and vendee will not be denied by the courts unless plainly prohibited. This is a penal ordinance, and unless the limitation of the right to make special contract sales is therein expressed or plainly and reasonably implied, the right must be upheld. The clear intent of the ordinance, as shown by its title and subject-matter, is to prevent the public from being defrauded by false weights and measures. It is declared unlawful for any vendor to sell any commodity ordinarily and usually sold in bulk or quantity by weight or measure unless two conditions are observed—first, it must be weighed on approved scales; second, that portion 'so sold by weight or measure' shall be true net weight.

"To analyze, for the purpose of construing, the section in question: Is the phrase 'by weight or measure' in the first clause, an adjective phrase modifying the nouns 'bulk' and 'quantity,' and thereby intended to mean that every such bulk or quantity shall be sold by net weight, or is it an adverbial phrase modifying the verb 'sell' and intended to mean that only such commodities as *are* sold by weight or measure shall be sold by true net weight?

"The second condition in the last clause refers to the commodity 'so . . . sold by weight or measure.' Why limit or modify the word commodity here by the phrase 'so . . . sold by weight' if the intention was that all commodities sold in bulk should be so sold? The city bases its contention mainly upon the decision of the supreme court of this state in the *City of Seattle v. Goldsmith*, 73 Wash. 54 [131 Pac. 456]. A careful examination easily distinguishes that case from the one at bar. The act there charged as a violation was different from the act here charged, and the prosecution was under a different ordinance. The ordinance in question there made it unlawful to sell in original packages, boxes, sacks, etc., any commodity ordinarily or usually sold in bulk or otherwise, by weight or measure, unless the true net weight be stamped on the face of the package, etc. The defendant sold California salt and California raisins in original sack or package by the pound without having the net weight stamped upon them. The defendant claimed that the provision requiring net weight of commodity to be stamped upon the container was unreasonable because it was impossible to estimate the loss by evaporation; that salt and raisins so packed will lose weight by evaporation, and that the true weight, if stated on the container at the time of packing, would not be the true weight at the time of sale, and hence the dealer would be liable for violation of the Federal act. Our supreme court held that as the packer or manufacturer was in the best position to ascertain loss by evaporation, it was not unreasonable to require him to overcome the loss approximately by increasing the size of the package. The question there was, failure to stamp net weight on container. The question here is the right of vendor and vendee to make a special contract for sale of a commodity by gross weight. If the question there had involved the right of Goldsmith and his customer to make a contract for the sale of a sack of

salt or a carton of raisins, by gross weight, then the question there would have been the same as the question here. An ordinance of New York City provided that 'All . . . meats . . . sold in . . . New York shall be weighed by scales duly tested, etc.' There would seem to be no ambiguity in this language. It would appear to require that *all* meat shall be sold by weight; yet it was construed as not prohibiting the right of special contract of sale by other methods in the case of *City of New York v. Fredericks*, 34 N. Y. Supp. 796, where the facts showed that defendant, a retailer of provisions, being asked for a pound jar of bacon, refused to sell by weight but sold by the jar and was prosecuted. The supreme court held that there was in the ordinance 'no express prohibition against a sale in jars of food not purporting to have been weighed, but which are sold as put up by the manufacturer,' and that 'a construction should not be given to such an ordinance by implication which would prevent the public from purchasing provisions or food protected from infection or contamination in jars or cans.' This decision was reviewed by the New York Court of Appeals which, taking judicial notice of the long practice of dealers in selling foods in cans and jars and not by weight, said:

" 'In no event can the court resort to implication to read into a penal ordinance a prohibition which is not expressed therein. In the clause of the ordinance under consideration there is no express provision forbidding the sale of meat by the jar as the defendant sold his bacon. Such a provision cannot be inserted by implication into an ordinance of this character;' and consequently they construed the ordinance to mean, 'merely a requirement that where the . . . commodities *are* sold by weight the balances used must be such as have been approved.'

"The same ordinance was later involved in *City of New York v. Wilkinson Bros. & Co.* [151 App. Div. 660], 136 N. Y. Supp. 219, except that the commodity in this case was twine instead of food. The defendants were jobbers in twines and sold one bale at twelve and a half cents per pound gross weight, which was 144 pounds, or seven pounds more than true net weight, the extra seven pounds being the weight of the covering of the bale and of the coverings of the several packages contained in a bale. The manufacturers customarily pack the twine in bales, each bale con-

taining a number of wrapped packages, and each package containing a number of balls. The net weight of the bales cannot be ascertained without completely unpacking the bales and unwrapping all the packages. The purchaser of the bale of twine knew of the custom and usage of the trade and purchased with such knowledge. The defendants were prosecuted for selling a commodity at more than its true net weight. The court held that notwithstanding the ordinance, it was competent for the vendor and vendee, without fraud or deception on the part of either, to make a contract of sale of a commodity in bulk or by gross weight.

"The case of *City of New York v. Sulzberger & Sons* [80 Misc. Rep. 660], 141 N. Y. Supp. 876, is more nearly in point. The ordinance previously referred to as amended provided that 'No person shall sell . . . any commodity . . . in the city of New York at or for a greater weight than the true weight thereof; and all . . . meats . . . sold in the city shall be weighed by scales duly tested, etc.' Defendants, packers and wholesalers, sold to a retailer '1 box of pork loins' containing 4 pork loins each separately wrapped. It was the usual and ordinary custom for the packer to wrap pork loins piece by piece in an oil or parchment paper in order to insure cleanliness, preserve appearance, and prevent shrinkage by evaporation, and to pack them in boxes and sell them in these original packages. This was a wholesale transaction and in the ordinary course of business, as previously conducted, between seller and purchaser. The meat in question weighed 61 pounds, the wrappers weighed 1 pound, but the meat was billed at 62 pounds net, and 69 pounds gross, including the box. The bill contained a statement 'wrapped meats sold gross weight.' The court held the transaction to be a sale by a wholesaler to a retailer of packed goods by the package at gross weight including wrappers, saying 'Thus both parties have, without fraud or deception on the part of either, made a contract of sale of a box of pork tenderloins by gross weight. That they have a right to do so cannot be questioned.'

"A like doctrine is laid down by the supreme court of Minnesota in *State v. Armour & Co.* [118 Minn. 128], 136 N. W. 565. The statute provided that 'Any person . . . who shall sell . . . less than the quantity he represents . . . shall be guilty,' etc. The purchaser, a retailer,

ordered by 'phone at an agreed price from the defendant, a packer and wholesaler of meats, '100 lbs. of pork loins and 200 lbs. of Boston Butts.' The retailer understood from their previous course of dealing the customary and usual way of wrapping such meats and packing the same in 50, 100 and 200 lb. boxes for sale in that manner to the trade, and that the billing of such meats always included the weight of the wrappers in the net weight of the meat. The defendant delivered '2 boxes of Boston Butts and 2 boxes of pork loins,' on which was stenciled the gross weight including boxes, and net weight including wrappers. The wrappers on the Butts weighed five pounds and on the loins four pounds. The defendant was charged with selling five pounds less of Butts and four pounds less of loins than he represented. The court said the 'key' to the statute was the word 'represented.' 'It does not prohibit two persons from coming to an understanding as between themselves that when one of them says 'pound of pork' the other shall understand such expression to mean a certain portion of hog meat wrapped in paper, which, together with its wrappings, weighs a pound. . . . If it be tacitly agreed between the seller and the buyer, whether by express agreement, or through mutual, though unexpressed, understanding, that an order or invoice for a certain number of pounds of a commodity, such as pork, refers to the number of pounds thereof, weight of wrapping included, and the thing sold . . . together with such wrappings, conforms in weight to the terms of the offer or invoice, how can it be said that less has been sold than represented. Less of what? That depends upon the understanding of the parties. . . . The test is, 'what has the seller represented? Or, in other words, has he upon the whole transaction made a misrepresentation?' . . . If by commercial usage 'Boston butts' and 'Pork loins' mean certain portions of hog meat, wrapped and ready for delivery, and the sale is made with reference to the meaning of these terms as thus defined, how can it be said that there has been a misrepresentation? . . . Certainly it cannot be truthfully said that there is a misrepresentation, where it appears that the thing referred to conforms, in kind, quantity, and condition, to the thing usually and commonly understood by the parties to be referred to when the terms in question are used.'

"But the identical commodity involved in the case at bar was the subject of a prosecution against these same defendants under the statute of Nebraska in the case of *State v. Swift & Co.* [84 Neb. 244], 120 N. W. 1127. There, as here, defendants sold in the usual course of trade, to a customer understanding the custom and usage of the trade, 'a wrapped ham and a piece of wrapped bacon' at their gross weight including the wrappers. The court say: 'It was the intention of the legislature in passing the act to prohibit the various kinds of fraud and deceit practiced . . . in the sale of food products. . . . It therefore seems clear that acts which have no tendency to cheat or defraud the purchaser . . . are not within the letter or spirit of the statute . . . The processes employed by Swift & Co. in preserving hams and bacon are resorted to for the sole purpose of enhancing their value as food products, and that, by wrapping them . . . no fraud or deceit is practiced upon the purchaser. He has his choice of purchasing wrapped or unwrapped meats. When he purchases the whole of a wrapped ham or side of bacon, it is weighed to him and the price he pays is determined by its gross weight. He knows that he is not only paying for the ham or side of bacon . . . but is also paying for the wrapping in which it is contained.'

"The Tennessee case of *State v. Co-operative Store Co.* [123 Tenn. 399], 131 S. W. 867, cited by the city attorney, is not contrary to the views herein expressed. The statute declared the weight of a bushel of corn meal to be 48 pounds, and made it unlawful to sell any corn meal except in bags or packages containing, by standard weight, two bushels, or one bushel, or one-half bushel, or one-fourth bushel, or one-eighth bushel, respectively, and required that each bag or package should have plainly marked thereon the weight. Defendant put up and sold corn meal in bags containing twenty-one pounds, less by three pounds than half a bushel. It was not sold by actual weight, nor was its actual weight marked on the package. The court say:

" 'The fraudulent practice sought to be suppressed is the sale of packages of corn meal, purporting, expressly or by implication, to contain certain weights and measures for which the purchaser is charged, when in fact they contain less quantities, whereby the public is deceived and defrauded

to the extent of the deficiency in weight or measure of the package purchased. . . . It is well known that corn meal is generally sold by the bushel, or the fraction of a bushel, and is put in packages purporting to contain such quantities, and the object of the statute is to prevent the giving of short weights in these packages, and the consumers from thus being deceived and defrauded.'

"After thus reciting the objects of the statute, the court squarely (in face of the wording making it unlawful to sell in any size packages except in certain aliquot parts of a bushel) uphold the right of vendor and vendee to agree upon a sale in any other or different size or manner, and say such statute 'properly construed does not prohibit . . . any person from selling meal in any bag, or other receptacle, or quantity, desired by the seller or consumer, when priced and delivered by actual weight or measure.'

"Neither does the case of *Freadrich v. State of Nebraska* [89 Neb. 343], 131 N. W. 618, cited by the city, announce any principle to the contrary. That prosecution was for selling misbranded food. Food was declared to be misbranded if sold in cans or pails without the net weight of contents being stamped on the container. A distinction was made in favor of one class of dealers. The defendant sold a pail of lard without having the net weight stamped on it. The question raised was the constitutionality of the classification, and the decision has no bearing upon the case at bar.

"In a recent case of *Spokane v. Arnold*, 73 Wash. 256, [131 Pac. 815], our own supreme court sustained the right, under a similar ordinance, to make special contract of sale. The provisions of the Spokane ordinance were substantially as follows:

"Sec. 22. 'A brick or cake of butter for commercial purposes' shall contain one pound of butter, net avoirdupois.

"Sec. 23. Whoever sells any goods sold by weight in any package, and fails to mark on the package the gross and net weight, shall be guilty, etc.

"Sec. 24 made it unlawful for any person, where goods are sold by weight or measure, to sell less than the quantity bargained for or named in the sale.

"Sec. 25 made it unlawful for any person to sell any article of food that shall be short in weight.

"Defendant sold '5 bricks or cakes of butter weighing less than 16 oz. avoirdupois net.' They were put up in cartons usually used to contain 1 pound of butter. There was stamped on each carton: 'Full weight 15 oz. net, 16 oz. gross.' The cakes and bricks were prepared in sealed packages ready for delivery in that manner. The supreme court took judicial notice that butter is usually sold in cakes or bricks by the pound, sometimes with and sometimes without cartons or containers, but without anything to indicate their weight, and held that the object of the ordinance was to prevent the practice of fraud upon consumers who naturally suppose that a carton of butter so sold would contain at least one pound, unless marked otherwise, and, there being no prohibition against the sale of butter in less than 1 lb. lots, so long as the carton showed the bricks or cakes to be less than 1 lb. net, there was no fraud, and say: 'The plain meaning of the ordinance is that, where butter is sold in cakes or bricks without any mark thereon, such cakes or bricks must contain 1 lb. net, avoirdupois. And where any quantity less than one pound is sold in cases or packages, the net and gross weight must be stated upon the containers.'

"Hence, the agreed facts in this case showing the long usage and custom of the trade with reference to this specially prepared brand of meat, the trade recognition and understanding that 'Wrapped Premium Bacon' means ham or bacon with wrappers, the purchasers' knowledge thereof from their previous course of dealing with defendant, and their distinct understanding at the time of ordering that they could obtain it only, and must pay for it, in wrapper by gross weight, and there being no fraud or deception or misunderstanding, but the transaction being open and in their usual course, whereby Newman & Co. purchased and defendant sold 'wrapped hams' and 'wrapped pieces of bacon' of the number ordered, and of the true weight, reckoned upon the basis agreed, I am compelled to hold that the transaction is not forbidden by the ordinance in question."

Appellant urges that the trial court did not correctly construe the ordinance, and that this case is indistinguishable from *Seattle v. Goldsmith*, 73 Wash. 54, 131 Pac. 456. We think the case at bar easily distinguishable from that case and that the trial court correctly so distinguished it.

It is also asserted that the trial court avoided the effect of the entire ordinance, it containing another section, No. 11, as follows:

"That from and after March 31, 1911, it shall be unlawful for any vendor in the city of Seattle, or his agent, clerk, or other employee, to sell, offer for sale, or have in his possession with the intent to sell in original packages, boxes, crates, bottles, cartons, cases, bags, sacks, or other receptacles, any commodity ordinarily or usually sold or offered for sale in bulk or otherwise, by weight or measure, unless the true net weight or measure of the commodity so contained shall be plainly and legibly stamped or printed on the face of each such package, box, crate, bottle, carton, case, bag, sack or other receptacle, and unless the commodity so sold or offered for sale is actually sold or offered for sale as of such true net weight or measure." Seattle Ordinance, No. 28,720, § 11.

We see nothing in that section either expressly or impliedly prohibiting a vendor and vendee agreeing on the sale of any article in bulk by gross weight if the purchaser is in no way overreached and deceived. Nor does section 11 of the ordinance render the ordinance any more comprehensive and prohibitory than the statutes of Nebraska involved in the case of *State v. Swift & Co.*, 84 Neb. 244, 120 N. W. 1127, and of Minnesota construed in *State v. Armour & Co.*, 118 Minn. 128, 136 N. W. 565, or the ordinance of New York City in *City of New York v. Sulzberger & Sons*, 80 Misc. Rep. 660, 141 N. Y. Supp. 876, cited and discussed by the trial judge.

The recent case of *Armour & Co. v. North Dakota*, 240 U. S. 510, merely upholds the constitutionality of a statute of North Dakota directing the manner of selling lard at retail, and does not involve any question of the right to sell at variance with such statute by special agreement respecting the weight of the commodity.

Nor do the cases cited involving rates of carriage of goods upon contracts for such rates in violation of statutes expressly forbidding such contracts, or impliedly so forbidding as con-

trary to public policy or the general welfare, apply to such a case as this.

If articles are exposed for sale and misbranded as to weight or measure, without special notice to a buyer of the true weight or measure and an agreement upon the sale thereof, so that purchasers would be deceived and defrauded in purchasing such articles, the ordinance in question would apply.

We concur with the reasoning of the trial judge and with that of the cases relied upon by him. The judgment is affirmed.

MORRIS, C. J., MOUNT, and PARKER, JJ., concur.

[No. 13406. Department One. January 4, 1917.]

N. R. RASHFORD, *Appellant*, v. RIDGEFIELD STATE BANK *et al.*, *Respondents*, JOHN J. ERICKSON *et al.*, *Defendants*.[1]

INTOXICATING LIQUORS—REGULATION — MANUFACTURES —"INTEREST IN RETAIL BUSINESS"—STATUTES. Rem. Code, §6282, making it unlawful for any manufacturer or wholesale dealer in intoxicating liquors to own or have any interest in the "liquor stock, fixtures or equipment" of any retail liquor store, does not apply to the premises on which the liquor business is conducted or invalidate a real estate mortgage thereon given by the dealer to a brewer.

Appeal from a judgment of the superior court for Clarke county, Jackson, J., entered November 18, 1916, dismissing, as to certain defendants, an action to foreclose a mortgage, upon sustaining a demurrer to the complaint. Affirmed.

McMaster, Hall & Drowley, for appellant.

Wood, Montague & Hunt and *M. M. Matthiessen*, for respondents.

MAIN, J.—The purpose of this action was to have a real estate mortgage declared a prior and superior lien, and for the foreclosure of the same. The defendants named in the

[1]Reported in 161 Pac. 1196.

complaint, who were holders of a mortgage prior in time, appeared by demurrer. This demurrer was sustained, and the plaintiff elected to stand upon the complaint and refused to plead further. Thereafter a judgment was entered dismissing the action so far as it pertained to the holders of the prior mortgage. From this judgment, the appeal is prosecuted.

From the facts stated in the complaint, it appears that, on September 30, 1912, John J. Erickson and wife mortgaged a certain lot or tract of ground, in the town of LaCenter, to the appellant. This mortgage was filed for record in the auditor's office of Clarke county on the 2d day of October, 1912. Prior to the giving of the appellant's mortgage, and on the 24th day of January, 1911, the Ericksons had mortgaged the same property, as described therein, to the Ridgefield State Bank. The latter mortgage was recorded on the 30th day of January, 1911. The mortgage was made to the Ridgefield State Bank in trust, and it is alleged that the actual owner of that mortgage was the Henry Weinhard Brewery, of Portland, Oregon. This brewery was engaged in the manufacture of fermented and malt intoxicating liquors, and selling the same in quantities of five gallons or more. At the time both of the mortgages mentioned were given, the premises described therein were occupied as a retail liquor store. The respondents here are the Ridgefield State Bank and the successors in interest of the Henry Weinhard Brewery. There is no allegation in the complaint that the Ericksons, at the time the mortgage was executed and delivered to the Ridgefield State Bank, were engaged in conducting the retail liquor store in the building which had been erected upon the lot covered by the mortgage.

The sole question for determination is whether the mortgage to the Ridgefield State Bank, as mortgagee in trust, was prohibited by chapter 84 of the Laws of 1909, p. 182, Rem. Code, § 6282, wherein it is provided that a manufacturer of or wholesale dealer in intoxicating liquors shall not own or have "any interest in the liquor, stock, fixtures, or equip-

ment" of any retail liquor store. The question, then, is whether the mortgage to the bank, in trust for the brewery, of the premises upon which a retail liquor store was being conducted, is prohibited by the statute. Obviously, the lot and the building thereon do not come within the language of the act referring to liquor, stock, or fixtures. Neither do we think that the word "equipment," as used in the statute, was intended to include the premises upon which the retail liquor store was conducted. Had the legislature intended that the lot and building should come within the purview of the act, it would have been easy to have so expressed it. Since, under the present state of the law in this state, the construction of this statute is not likely to be again called for, it does not seem necessary to prolong the discussion relative to its meaning.

The judgment will be affirmed.

MORRIS, C. J., CHADWICK, PARKER, and ELLIS, JJ., concur.

[No. 13508. Department Two. January 4, 1917.]

MIANUS MOTOR WORKS, *Respondent*, v. B. H. VOLLANS, *Appellant*.[1]

SALES—WARRANTY—PERFORMANCE OR BREACH. A contract for a hoist according to plans and specifications, to be fitted to defendant's gasoline logging engine, already in use, and to be "connected to a pinion shaft with cut gears, to get two speeds on drums," with specified revolutions per minute, the hoist having no power itself, does not guarantee the power of the engine to drive the drums at such speeds, and the failure of the engine to develop such speeds does not constitute a breach of warranty.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered December 31, 1915, upon findings in favor of the plaintiff, in an action on contract, tried to the court. Affirmed.

[1]Reported in 162 Pac. 49.

Cooley, Horan & Mulvihill, for appellant.

Louis A. Merrick, for respondent.

HOLCOMB, J.—On a former appeal, *Mianus Motor Works v. Vollans*, 83 Wash. 680, 145 Pac. 997, affirming an order granting a new trial, we determined certain questions as to the construction of the contract between the parties, and the effect of a certain instruction thereon given by the court and by the trial court and this court held erroneous. When the case went down for new trial, defendant, who was the appellant in the former appeal and in this, attempted to amend his affirmative answer, and also offered evidence in support thereof to the effect that there were certain defects in construction of the gasoline logging engine so that certain stated speeds of the hauling drum and of the haul-back drum could not be obtained; that it was defectively so constructed that, when connected with the pinion shaft, two speeds of the revolving drums could not be obtained; and that the engine, when being used for hauling poles and piling, would not develop three hundred and sixty revolutions per minute upon the pinion shaft, or any speed whatsoever.

These amendments and the offers of evidence of like import, upon objection by the respondent, were refused by the trial court, holding that the decision on the former appeal left nothing to decide other than that contained in the pleadings. The jury was discharged, the trial proceeded to the court, the evidence introduced at the former trial was reintroduced, and appellant offered evidence of the knowledge of the vendor of the engine of the purpose contemplated for its use by appellant, and of the meaning of certain clauses of the contract and of the specifications, and contended that the contract contained an express warranty as to the completed machine, which comprised a gasoline logging engine, hoist, and everything to constitute the complete logging rig as an entirety. The trial court later permitted the amendment to the answer to be considered as made *pro forma*, but rejected the

offered proofs. Judgment was granted respondent for a balance unpaid on the contract of $926.30, and $66.80 for certain extras and interest.

As was said on the former appeal:

"The rights of the parties in this case are fixed by their written contract. This contract called for a hoist in accordance with the blue print and specifications. *There is no claim that the hoist was not constructed as contracted for.* The engine which was mounted upon the hoist was the one which the contract called for, *and which had previously been used by the defendant.*" [Italics this writer's.]

And further:

"But it is claimed . . . that the engine when mounted upon the hoist . . . *would not develop the power necessary to do the work* and that the engine was not covered by the blue print and specifications. The answer to this is that the engine and hoist became a completed rig. *The engine was the one specified in the contract and which had been used by the defendant for some months.*"

Precisely the same contract is now before us. Precisely the same conditions as to the alleged guaranty are now before us. It is the same engine and the same adjustment of a certain engine which appellant had previously bought *and used for some months*, and furnished by appellant. Nothing materially different in any way is shown. The rights of the parties are still to be fixed by the same contract. That contract called for the construction of certain machinery and the "fitting of appellant's engine on a cast frame and connected to a pinion shaft with cut gears, to get two speeds on drums; a slow speed of 24 revolutions per minute and a high speed of 36 revolutions per minute, and on the haul-back drum a high speed of 48 to 50 revolutions per minute." There is not a syllable of the contract that guarantees the power of the engine to drive the drums at such speeds. The apparatus to be furnished by respondent, including the drums, had no power or motion in itself whatsoever. Power had to be applied and

motion produced by an engine, and that, it was agreed, was to be the engine owned and furnished by appellant.

There is no logical escape from the conclusion that, since there was no defect in the hoist and drums furnished by respondent, nor in the adjustment thereto of the engine, if anything was defective and the cause of the failure to obtain the power and speed required, it was in appellant's engine.

Judgment affirmed.

MORRIS, C. J., MOUNT, and PARKER, JJ., concur.

[No. 13510. Department One. January 4, 1917.]

THE STATE OF WASHINGTON, *Respondent*, v. G. C. KLEIN, *Appellant*.[1]

LARCENY—DRIVING AWAY CATTLE—RECEIVING STOLEN GOODS—EVIDENCE—SUFFICIENCY. A conviction of larceny as accessory before the fact, and of buying and selling stolen property with knowledge of the theft, under Rem. Code, § 2601, subds. 1 and 5, is sustained, where there was evidence to the effect that the accused hired two men to take two steers from the pasture of the prosecuting witness and drive them to the accused's slaughter house where he butchered them, and that part of the carcasses, which were unusually large, were traced to the possession of the accused.

INDICTMENT AND INFORMATION—JOINDER OF OFFENSES—ELECTION—STATUTES. Under Rem. Code, § 2601, defining the crime of larceny as capable of being committed in one of the several ways stated disjunctively in the 5th subdivision of the section, and § 2260, abrogating the common law distinction between principals and accessories before the fact, an information charging larceny by hiring two men to commit the theft of two steers, and that the men actually committed it, and that defendant purchased and received the steers from them, is not duplicitous in charging inconsistent offenses, and it is not error to refuse to require an election.

CRIMINAL LAW—ACCESSORIES—INSTRUCTIONS. In a prosecution for being an accessory to a larceny, it is proper to instruct that when one who, with intent to incite another to commit a crime, intention-

[1]Reported in 162 Pac. 52.

ally signifies to that other his assent, and the other as a result of such incitement does commit it, the first person aids and abets; since the word "signify" implies an overt act beyond a mere tacit assent.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered December 28, 1914, upon a trial and conviction of larceny and of receiving stolen property. Affirmed.

H. J. Snively, for appellant.

Harold B. Gilbert and *Sydney Livesey*, for respondent.

ELLIS, J.—Defendant, by a jury, was found guilty upon an information charging in substance that, on or about June 10, 1914, he encouraged, advised, induced, hired, aided, assisted, abetted, and procured one Charles Matney and one George Yeager to take, lead and drive away two steers belonging to another, with intent to deprive and defraud the owner thereof, by reason whereof Charles Matney and George Yeager, on or about that date, did take, lead and drive away two steers, each weighing about 1,500 pounds, each of a value of about $125, and each being the property of the Pacific Cold Storage Company, a corporation; and further charging him with buying and receiving such steers from Matney and Yeager knowing them to have been stolen. We shall not quote the lengthy information. It will suffice to say that it charged defendant with larceny as an accessory before the fact, under subdivision 1 of Rem. Code, § 2601, and with buying and receiving stolen property with knowledge of the theft, under subdivision 5 of the same section.

While sharply conflicting, it is not disputed that there was evidence tending to show that, on and prior to July 10, 1914, the Pacific Cold Storage Company owned a number of unusually large steers which were kept in a pasture near the town of Toppenish, in Yakima county; that two of these having unusually large feet were missed from the pasture on July 11, 1914, and a day or two later were tracked by the

men in charge to defendant's slaughter house, on the west side of the Yakima river opposite the town of Granger; that pieces of meat, such as would be produced only from unusually large animals, were found in defendant's meat market in the town of Granger, and that one head conforming to that of one of the steers, and two hides of large animals of the color and bearing the brands of the two missing steers, were found secreted near defendant's slaughter house. We shall not discuss the evidence in detail, since it is not disputed that there was evidence, though contradicted, from which the jury were justified in believing that defendant hired two men, Matney and Yeager, to take the two steers from the pasture on the night of July 10, 1914, and drive them to his slaughter house; that by prearrangement they awakened defendant by tapping upon the window of his residence near the slaughter house; that, with the assistance of the two men, defendant slaughtered one of the steers that night and the other the next day; that defendant paid the two men $43 for the steers and took the meat, shipping part of it to Spokane and selling part of it at his meat market in Granger. Though most of the evidence as to defendant's connection with the crime was found in Yeager's testimony, Matney having broken jail and escaped prior to the trial, and though Yeager told a somewhat different story when first arrested, the credibility of his testimony at the trial, corroborated as it was in many particulars by other testimony and circumstances, was clearly for the jury.

When the state had rested, counsel for defendant moved that the prosecution be required to elect whether it would ask for a conviction of defendant as an accessory before the fact, or as a principal in the act of larceny, or as a receiver of stolen property. The motion was denied, the court holding that the question of defendant's guilt as an aider and abetter in the actual theft and as a receiver of stolen property knowing of the theft should be submitted to the jury. When the evidence was all in, the court gave instructions submitting

these two questions. From the judgment of conviction and sentence, defendant has appealed, assigning two grounds.

(1) It is first asserted that the court erred in refusing to compel the state to elect and in instructing the jury that it might convict appellant either as an aider and abetter in the larceny or as a receiver of the stolen property. In this connection, the argument rests upon the postulate that the charges of actual commission of the larceny and of receiving the stolen goods are, in their nature, inconsistent, the one disproving the other. It is said that one cannot be holden as receiver of goods which he himself has stolen. Sustaining authorities are cited, but we find it unnecessary to review them. The postulate may be accepted as sound without invalidating either the information or the instruction here involved. The information did not charge appellant with participating in the actual theft. It did not charge that he was even present when the theft was committed. On the contrary, it charged that he hired and procured the other two men to commit the theft, and in terms that the other two men actually committed it and that he purchased and received the steers from them knowing that fact. There is nothing inconsistent in the things charged against appellant. Rather the knowledge that the cattle had been stolen when he received them necessarily resulted from his procurement of the theft. Any argument to the contrary must ignore the obvious. There is no inconsistency in being an accessory before the fact and a receiver afterwards. *Regina v. Hughes*, 1 L. T. 450; *People v. Feinberg*, 237 Ill. 348, 86 N. E. 584.

"The fact that, under the Penal Code, by aiding and abetting the crime of larceny he became a principal, in no way brought such an accessory within the principle of the rule that a person taking goods feloniously cannot receive them from himself with a felonious intent. This rule, however, in no respect applies to an individual who was not present at the commission of the crime. Although, under the Penal Code he was guilty of the principal offense, yet, receiving the goods from the actual thief, knowing their origin, he is subject to the

penalty for receiving stolen goods." *People v. Rivello*, 39 App. Div. 454, 57 N. Y. Supp. 420.

Our criminal code, in § 2601, *supra*, defines the crime of larceny as capable of being committed in any of the several ways set out disjunctively in the five subdivisions of that section. Another section, 2260, abrogates the common law distinction between principals in the first and second degrees and principals and accessories before the fact. It classifies and makes punishable as principals all aiders and abetters whether present or absent and whether participating or only "counseling, encouraging, hiring, commanding, inducing or otherwise procuring" the commission of the offense. See, also, Rem. Code, §§ 2007 and 2262. In other words, the defining statute enumerates disjunctively a series of acts, either of which separately, or all together, so far as they are not in their nature inconsistent, may constitute the single offense of larceny. In such a case it is thoroughly settled that the information may charge in a single count the commission of the offense in any, or, by conjunctive allegation, in all of the enumerated and not inconsistent ways. "And proof of it in any one of the ways will sustain the allegation." *State v. Holedger*, 15 Wash. 443, 46 Pac. 652; *State v. Newton*, 29 Wash. 373, 70 Pac. 31; *State v. Ilomaki*, 40 Wash. 629, 82 Pac. 873; *State v. Adams*, 41 Wash. 552, 83 Pac. 1108; *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989; *State v. McBride*, 72 Wash. 390, 130 Pac. 486; *State v. Pettit*, 74 Wash. 510, 133 Pac. 1014; 1 Bishop, New Criminal Procedure (2d ed.), § 436; 14 R. C. L. 40.

There was neither allegation nor evidence that appellant was present at the actual theft. There was evidence that he advised and procured its commission and he finally admitted that he received the carcasses of the animals brought to his slaughterhouse by the other two men. There was no error in refusing to compel an election. The instruction complained of was proper as applied to the evidence.

(2) The giving of the following instruction is also assigned as error:

"In order to make a person guilty of a crime it is not always necessary that he do the criminal act with his own hands. If a person with intent that another shall commit a crime and to incite him to commit it intentionally signifies to that other his assent to the other's commission of the crime, and if the other is thereby incited to commit the crime, and as a proximate result of such incitement does commit it, the person who signifies to the other his assent to the commission of the crime aids and abets its commission in the sense I shall use said words in these instructions."

It is argued, in substance, that under this instruction a conviction for aiding and abetting would have been justified by proof of mere knowledge and tacit assent by silence. An instruction reasonably capable of such a construction would be clearly erroneous under the rule announced in *State v. Peasley*, 80 Wash. 99, 141 Pac. 316. Had the word "assent" been used disjunctively in the instruction here, as it was in the one there involved, there would be force in appellant's criticism. In that case it is said that there must be some form of overt act; "the doing or saying of something that either directly or indirectly contributes to the criminal act." The instruction here involved palpably meets that criterion. The instruction says that when one "with intent" and "to incite" another to commit a crime "intentionally signifies to that other his assent" and the other as a "result of such incitement does commit it," the first person aids and abets. The quoted words necessarily imply some overt act by deed or word "signifying" the assent. The verb "signify" means "to make known by signs or words; express; communicate; announce; declare." See Student's Standard Dictionary.

The record presents no error warranting a reversal. Judgment affirmed.

Morris, C. J., Main, Webster, and Chadwick, JJ., concur.

[No. 13562. Department Two. January 4, 1917.]

ANNA M. CARLSON, *Respondent*, v. NELLIE REA, *Appellant*.[1]

HUSBAND AND WIFE — SEPARATE PROPERTY OF WIFE — EVIDENCE — SUFFICIENCY. Property acquired by a wife during coverture, purchased by her with her separate funds without any contribution thereto by her husband, is her separate property; and her testimony to that effect is sufficient to overcome the presumption that it was community property.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered November 8, 1915, upon findings in favor of the plaintiff, in an action to quiet title, tried to the court. Affirmed.

Million & Houser, for appellant.

Hayden, Langhorne & Metzger, for respondent.

MOUNT, J.—This action was brought by the respondent to quiet title to certain real property against the claim of the appellant. When issue was joined, the case was tried to the court without a jury, and resulted in a judgment in favor of the respondent as prayed for in the complaint. The defendant has appealed from that judgment. There is no substantial dispute in the testimony, which shows the following facts:

On the first day of November, 1909, the appellant procured a judgment for the sum of $366.35, and costs, against Charles F. Carlson, the husband of the respondent. This judgment was based upon a promissory note, executed by Mr. Carlson on the 26th day of February, 1909. In that action, although the respondent was named as a defendant, she was not served with process and there was no allegation in the complaint seeking to charge her with personal liability. She did not appear in the action and no judgment was taken against her. Judgment was entered against her husband, Charles F. Carlson, alone. Thereafter, in February, 1915,

[1]Reported in 161 Pac. 1195.

an execution was issued upon that judgment and levied upon the property in question. The property was sold under that writ and bid in by the appellant.

This action was brought by the respondent to remove the cloud caused by the sale under that judgment. The respondent claimed that the property in question was her separate property, and testified that, upon coming to this state in the year 1895, she brought with her about $400 which was her separate property; that she invested this money in real estate the title to which was taken in her own name; that this real estate was afterwards sold at an advance, and the proceeds thereof invested in other real estate the title to which was taken in her own name, and the proceeds of that property was invested in the property in dispute, which also was taken in her own name and which was held by her of record, in her own name, at the time the execution was levied thereon. She also testified that Mr. Carlson had contributed nothing to the acquisition of the property, but that the property is the proceeds of her separate property.

Several questions are presented in the briefs which it will not be necessary to notice. We are satisfied, from a reading of the record, that the property in dispute is the separate property of the respondent and is not the community property of respondent and her husband. In *United States Fid. & Guar. Co. v. Lee*, 58 Wash. 16, 107 Pac. 870, at page 22, we said:

"Where property is acquired during marriage, the test of its separate or community character is whether it was acquired by community funds and community credit, or separate funds and the issues and profits thereof; the presumption always being that it is community property, but this presumption may be rebutted by proof."

And in *Guye v. Guye*, 63 Wash. 340, 115 Pac. 731, 37 L. R. A. (N. S.) 186, we said, at page 352:

"Moreover, the right of the spouses in their separate property is as sacred as is the right in their community property,

and when it is once made to appear that property was once of a separate character, it will be presumed that it maintains that character until some direct and positive evidence to the contrary is made to appear."

In *Meyers v. Albert*, 76 Wash. 218, 135 Pac. 1003, we said, at page 222:

"Where money earned in a foreign jurisdiction is brought to this state and invested in real property, the title to the property purchased inures to the person whose money was invested therein."

So it is plain that the property in question in this case, having been purchased by the separate funds of the wife and title taken in her name, is her separate property and not subject to the debts of either the community or the separate debt of the husband. The only evidence we find in the record in this case which tends, in any way, to show that this property is the community property of the respondent and her husband is the mere fact that it was acquired during coverture; and also that the husband at one time joined in a mortgage executed by the wife upon the property, but the presumptions which arise from these circumstances are subject to be rebutted by proof, and, in this case, were clearly rebutted by the testimony of the respondent upon that question.

We are satisfied that the trial court arrived at the correct conclusion, and the judgment appealed from is therefore affirmed.

MORRIS, C. J., HOLCOMB, PARKER, and FULLERTON, JJ., concur.

[No. 13581. Department Two. January 4, 1917.]

E. W. BADER, *as Northwest Locators, Respondent*, v. MOORE BUILDING COMPANY, *Appellant*.[1]

BROKERS—COMMISSIONS—CONTRACT—PERFORMANCE. Where parties to a contract for the sale of corporate stock agreed to a modification of the same, the broker making the sale, who had contracted to find a purchaser, and who, after the modification, agreed to take his commissions in $3,500 in first mortgage bonds of the corporation as enlarged by the sale, is not entitled to any commissions unless the contract is carried out.

CONTRACTS—MODIFICATION—CONSIDERATION. The substitution of a new contract for an old one containing inconsistent terms, rescinds the old one and constitutes a sufficient consideration for the new contract.

BROKERS—RIGHT TO COMMISSIONS—CONTRACT—PERFORMANCE. A broker agreeing to take commissions in bonds on completion of a contract cannot complain that the seller did not enforce the contract but exercised an option, reserved in the contract, to cancel the same on the default of the buyer, where there was no fraud practiced and no arbitrary refusal to enforce the contract.

Appeal from a judgment of the superior court for King county, Ronald, J., entered January 26, 1916, upon findings in favor of the plaintiff, in an action on contract tried to the court. Reversed.

Shorett, McLaren & Shorett, for appellant.

Chas. S. Hills and *Aust & Terhune*, for respondent.

MOUNT, J.—This action was brought to recover a broker's commission for an exchange of certain properties. The complaint alleged that the plaintiff was a real estate broker; that he was employed by the defendant to procure a purchaser for all the stock in the defendant corporation; that he procured such purchaser; and that his commission was agreed to be the usual commission. The defendant entered a general denial. Upon the trial of the case to the court

[1]Reported in 162 Pac. 8.

without a jury, findings were made and a judgment was entered in favor of the plaintiff for $2,500. The defendant has appealed. The findings of the court are not questioned on the appeal, but are to be taken as correct.

It is argued by the appellant that, upon the findings, the court should have entered a judgment in its favor. It appears from the findings that, in January, 1915, the appellant requested the respondent to find a customer for the purchase of all the capital stock of the appellant corporation; that, if he did so, the appellant would pay him a reasonable commission; that the respondent thereupon found a purchaser in the persons of H. A. Kalb and wife; that, after some negotiations, Kalb and wife entered into a contract with the appellant by which it was agreed that Kalb and wife would convey certain lands to the appellant corporation, and receive therefor one-half of the stock of that corporation. The lands were described in the contract. The contract then recites:

"Now, therefore, it is hereby agreed that the parties of the second part [Kalb and wife] will make over to said corporation all of the last several above described properties and in payment therefor the said corporation agrees to procure the issuance and to issue to the said parties of the second part fifty (50%) per cent of the said capital stock of the party of the first part, having a present par value of fifty thousand ($50,000) dollars but having a real value on the increase by the additional property of a premium of fifty thousand ($50,000) dollars, or a total valuation of one hundred thousand ($100,000) dollars.

"It is understood and agreed that there is a certain obligation of seven thousand ($7,000) dollars more or less against said land which parties of the second part are to procure satisfaction of within thirty (30) days or if they fail to secure said satisfaction it shall be optional with the party of the first part to accept the direct obligation of the parties of the second part for such amount or cancel this contract.

"It is further understood and agreed that all of the necessary legal transactions to effect the consolidation of the

foregoing interests are to be carried through without unnecessary delay, and if either party fails to carry out its or their agreement within thirty (30) days from the date hereof, it may be optional with the party to cancel this contract."

The court made the following finding of fact:

"That, before entering into the said contract with the said Kalb and wife, the defendant consulted with this plaintiff concerning the desire of the defendant to enter into a contract as above set forth, changing the amount of the capital stock desired to be exchanged by the defendant, from the entire amount of the capital stock to only one-half thereof, and the plaintiff consented to such change. That thereupon it was the understanding and agreement between plaintiff and the said defendant and said Kalb that the plaintiff should receive as his compensation from the new corporation as enlarged after the accession of said Kalb and wife, a commission of $3,500 in first mortgage bonds of the said enlarged corporation. That the said contract between the defendant and Kalb was not carried out, because of the refusal of said Kalb, after entering into the same, to carry out the same, and abandoning the same, and of the failure of the said defendant to compel said Kalb to carry out said contract and permitting him to so abandon the same. That because of defendant's failure and refusal to enforce said contract and carry the same out, and abandonment thereof, it was not possible for the plaintiff to be paid said commission in bonds of the proposed enlarged corporation. That plaintiff performed the services which he was employed by defendant to perform, and procured for the defendant a purchaser upon terms satisfactory to defendant, which the defendant afterwards, as aforesaid, refused to enforce, and that defendant thereby became indebted to the plaintiff for the usual and customary commission charged by and paid to real-estate agents and brokers where exchanges are made. That the usual and customary commission in such cases is 5% of the entire value of the exchange, the parties exchanging to pay the broker 2½% commission upon the value of their respective properties to be exchanged."

It is plain from this finding of fact that the respondent knew of the terms of the contract which was about to be entered into between Kalb and wife and the appellant, and it

was agreed that the respondent should receive, as his compensation for bringing the parties together and effecting this contract, a commission of $3,500 in first mortgage bonds of the enlarged corporation. No doubt, this was one of the considerations for the principals to enter into this particular contract. It was clearly a modification of the original agreement to pay the usual commission for a sale of all of the capital stock of the appellant company, and it seems clear that, having entered into this contract for his commission, the respondent was entitled to no commission unless the contract was carried out. The court finds that the contract was not carried out. The rule is that:

"The legal effect of a subsequent contract covering the same subject matter and made by the same parties as an earlier agreement, but containing terms inconsistent therewith, so that the two cannot stand together, is to rescind the earlier contract. It becomes a substitute therefor, and is the only agreement between the parties upon the subject." *Sherman v. Sweeny*, 29 Wash. 321, 69 Pac. 1117.

In *Loudon v. Spencer*, 84 Wash. 236, 146 Pac. 612, we said:

"The court found upon sufficient evidence that the substituted contract was that the appellant should receive $250 only upon completing the clearing of the seventeen acres and another small tract. By the acceptance of this contract, the appellant waived any right of recovery upon the old contract."

It is contended by the respondent that there was no consideration for the new contract; but it is apparent from the finding quoted that the consideration for the new contract was that the appellant and Kalb and wife should enter into the contract which was proposed by this respondent. Before entering into that contract, the court finds that the appellant consulted this respondent and respondent agreed to receive, as his commission, the $3,500 in bonds of the new corporation, and thereupon, Kalb and wife and the appellant entered into the contract. It seems plain, therefore, that

there is sufficient consideration for the new contract between the broker and his principal. In *Stofferan v. Depew*, 79 Wash. 170, 139 Pac. 1084, we said:

"The substitution of a new contract for an old one, in itself constitutes a sufficient consideration."

There was no sale of all the capital stock, as originally contemplated. The court finds that the contract between the appellant and Kalb was not carried out because of the refusal of Kalb to comply with the terms of the contract, and because the appellant did not require Kalb to specifically perform his contract. The trial court was evidently of the opinion that the appellant thereby became liable for the commission as originally agreed upon. But it will be observed, by reference to the last two paragraphs of the contract above quoted, that it was understood that there was an obligation of $7,000 against the lands which Kalb and wife had agreed to turn in to the corporation, and it was agreed that, if Kalb and wife did not procure the satisfaction of that lien within thirty days, then it was optional with the appellant to accept the direct obligation of Kalb and wife, or to cancel the contract. From these provisions of the contract, the appellant had two remedies: First, to take the personal obligation of Kalb and wife; or second, to cancel the contract. These provisions of the contract were known to the respondent when he agreed to take his commission in first mortgage bonds upon the enlarged corporation. He assumed that the contract would be carried out by Kalb and wife, and knew that, if Kalb and wife did not carry out the contract according to its terms, it was optional with the appellant to cancel the contract. In other words, the respondent agreed to accept his commission in first mortgage bonds if the contract was carried out. It was not carried out, and of course he was not entitled to his commission. There is no contention in the case that the parties acted either fraudulently or arbitrarily. It seems to follow, therefore, that the failure of the contract is

a complete defense to the action for commission. It is, no doubt, the rule, as claimed by respondent, that where a broker furnishes a purchaser, ready, able, and willing to purchase, and a contract is entered into, in the absence of any special agreement, the broker is entitled to his commission. *Riggs v. Turnbull*, 105 Md. 135, 66 Atl. 13, 8 L. R. A. (N. S.) 824, 11 Ann. Cas. 783 (especially the note at page 786). But it is equally true that, where the broker agrees to take his commission upon the completed contract, he is not entitled to his commission unless the contract is finally consummated. 4 R. C. L. page 311, par. 50. It is there said:

"Obviously, where a broker's commissions are expressly conditioned upon the consummation of the contract to be negotiated, it must be performed by the parties thereto to warrant a recovery of his remuneration."

The trial court found that, because of the defendant's failure to enforce the contract, it was not possible for plaintiff to be paid said commission in bonds of the proposed corporation; but there is no finding and no contention, as we understand the record, that there was any arbitrary refusal to enforce the contract or any fraud practiced therein. It is apparent from the terms of the contract, as we have seen above, that, upon the refusal of the purchaser to procure satisfaction of the $7,000 lien against the lands, the appellant might accept the direct obligation of the purchaser, or cancel the contract. Under these provisions, before the respondent was entitled to recover his commission, it was incumbent upon him to prove that there was fraud, or arbitrary refusal of the appellant to require Kalb and wife to perform the contract. It is clear, from the terms of the contract, that there was no arbitrary refusal, because, if the appellant did not desire to take the personal obligation of the purchaser, his express remedy, provided by the contract, was to cancel the contract, which was apparently done. These conditions were known to the respondent when he agreed to take his commission in first mortgage bonds. We are satisfied, for

these reasons, that the respondent was not entitled to recover because the contract was not carried out, and because he had agreed that his commission was dependent upon the fulfillment of the contract.

The judgment is therefore reversed, and the cause dismissed.

MORRIS, C. J., HOLCOMB, FULLERTON, and PARKER, JJ., concur.

[No. 13598. Department Two. January 4, 1917.]

ALASKA PACIFIC STEAMSHIP COMPANY, *Appellant*, v. SPERRY FLOUR COMPANY, *Respondent*.[1]

PARTIES—"REAL PARTY IN INTEREST"—PARTIES INSURED AGAINST LOSS. It is no defense to an action against a wrongdoer that the plaintiff was insured against the loss by an employers' liability policy and had recovered the amount of the loss from the insurance company; and hence the plaintiff may maintain the action as the real party in interest, within the meaning of Rem. Code, § 179, especially where the insurance company was a mutual company and plaintiff must contribute to the insurance fund.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered January 11, 1916, upon the pleadings in favor of the defendant, upon sustaining a demurrer to the reply, in an action on contract. Reversed.

Huffer & Hayden, for appellant.

Hayden, Langhorne & Metzger, for respondent.

HOLCOMB, J.—The Alaska Pacific Steamship Company, appellant herein, seeks in this action to recover from respondent $4,479.10, paid by appellant in satisfaction of a judgment rendered against it in that amount in favor of one Joseph Egan. The pertinent facts are that Egan was a longshoreman in appellant's employ, and was injured while assisting in loading one of its steamers at respondent's dock, in Tacoma harbor, by slipping from a plank which it was

[1]Reported in 162 Pac. 26.

alleged was negligently fastened and furnished by respondent for the use of appellant and its employees, and falling on the beach and sea wall of the harbor. Egan then brought an action against both respondent and appellant to recover for the injuries sustained by him. A judgment of dismissal was entered as to respondent, but judgment was entered against appellant in the sum of $4,479.10 and costs.

Appellant thereupon instituted the present action against respondent, alleging that Egan's injury was the result of respondent's negligence solely, no negligence whatever being attributable to appellant. By way of defense to this complaint, respondent alleged that, at the time Egan was injured, appellant carried employer's liability insurance to indemnify it for all loss or damage it might sustain by reason of any of its employees being injured while in its employ; and that, after the rendition of judgment against it in the Egan suit, appellant's insurer paid it the full amount of this judgment, together with costs.

After a demurrer to this affirmative defense was overruled, appellant in its reply admitted that it was, at the time of the injury to Egan, carrying employer's liability insurance, but that its insurer was a mutual insurance company commonly called a club in which appellant, together with the other members, contributed to the payment of all losses; admitted that it had been paid by the insurer, but alleged that it had, in compliance with its obligation as a member of said club, contributed to the fund by which it was so paid, and therefore it had not been fully reimbursed for its loss and would share in any recovery herein. A demurrer to this reply having been sustained, appellant refused to plead further, and a judgment on the pleadings was entered against appellant, this appeal resulting.

The sole question raised by this appeal is whether, under this state of facts, appellant is the real party in interest within the meaning of Rem. Code, § 179, and therefore entitled to prosecute this action as plaintiff, it being respond-

ent's contention that, as soon as the judgment entered against appellant was paid by the insurance company, appellant was rendered whole and the insurance company was subrogated to all appellant's rights and became the real party in interest and therefore the only one entitled to prosecute this action.

There have been frequent but not harmonious expressions of the different courts on this subject, the authorities seeming to be about equally divided as to whether the insured is the real party in interest in an action instituted by him against a wrongdoer when he has been fully reimbursed for the loss by the insurer; and despite respondent's contention that this is no longer an open question in this state by reason of the rule announced in *Broderick v. Puget Sound Traction, Light & Power Co.*, 86 Wash. 399, 150 Pac. 616, we approach the investigation thereof for the first time and untrammeled by former decisions. In the *Broderick* case, *supra*, the plaintiff was not the insured and there never was any insurance paid by the insurer. It is obvious that there could be no question of whether the insured, upon payment of the loss, could be subrogated to the rights of the insured; and while there might be some language in that decision which, if construed alone, might tend to support respondent's assertion, yet, when considered in connection with the facts, which must always be the case, this language does not support respondent's position.

Cunningham v. Seaboard Air Line R. Co., 139 N. C. 427, 51 S. E. 1029, 2 L. R. A. (N. S.) 921; *Travelers' Ins. Co. v. Great Lakes Engineering Works Co.*, 184 Fed. 426, 36 L. R. A. (N. S.) 60, and other cases which hold that the insurer is subrogated to the insured's rights and that he is, therefore, not the real party in interest, proceed upon the theory that, since the insured has recovered the loss from the insurer, he has sustained no loss and is not in a position to complain. While there is respectable authority to sustain this position, yet we think the sounder rule, and the one which

will come nearer giving substantial justice to all parties in such a situation, is announced in *Illinois Cent. R. Co. v. Hicklin*, 131 Ky. 624, 115 S. W. 752, 23 L. R. A. (N. S.) 870, as follows:

"The law is well settled that a wrongdoer has no right to the benefits of the insurance, and cannot rely, either in full or *pro tanto* on the defense that the owner of the property has been previously paid by the insurance company. Payment to the owner by an insurance company of the amount of his loss does not bar the right against another originally liable for the loss."

To the same effect are, *The Propeller Monticello v. Mollison*, 17 How. 152; *The Metis*, Fed. Cas. No. 9,500.

There is a fatal fallacy in the reasoning which concludes that the insured is made whole upon payment of the loss to him by the insurer, in that the premiums are not refunded to the insured so paid by him to the insurer for the policy of insurance and these premiums, if paid over some length of time, would aggregate a considerable sum of money. Nor does it seem that a wrongdoer should not respond for his wrongful acts in damages to the insured and thereby profit by reason of the sagacity of the insured in keeping his property protected by insurance.

It is not a necessary corollary that appellant, by being allowed to recover in this case, would derive double damages, since the insurance company might have a right of action against appellant for the money so recovered. In any event, the answer to this contention is that he recovers but once for the wrong done him by the tort feasor and once upon his insurance policy by virtue of a contract with the insurer to which the tort feasor is in no way privy. It was held by Judge Cooley in the case of *Perrott v. Shearer*, 17 Mich. 48, 55, that the insured should be allowed to sue the wrongdoer even though such a rule allowed him to collect double damages. He there said:

"It certainly strikes one, at first, as somewhat anomalous, that a party should be in a position to legally recover of two

different parties the full value of goods which he has lost; but we think the law warrants it in the present case, and that the defendant suffers no wrong by it. He is found to be a wrongdoer in seizing the goods, and he can not relieve himself from responsibility to account for their full value except by restoring them. He has no concern with any contract the plaintiff may have with any other party in regard to the goods, and his rights or liabilities can neither be increased nor diminished by the fact that such a contract exists. He has no equities as against the plaintiff which can entitle him, under any circumstances, to an assignment of the plaintiff's policies of insurance. The accidental destruction of the goods in his hands was one of the risks he ran when the trespass was committed, and we do not see how the law can relieve him from the consequences. If the owner, under such circumstances, keeps his interest insured, he cannot be held to pay the money expended for that purpose for the interest of the trespasser. He already has a right of action for the full value of the goods, and he does not give that away by taking a contract of insurance. For the latter he pays an equivalent in the premium, and is, therefore, entitled to the benefit of it, if any benefit shall result. The trespasser pays nothing for it, and is, therefore, justly entitled to no return."

Surely the liability of a wrongdoer cannot be increased or diminished by reason of the contract of insurance entered into between the insurer and insured, and which is of no concern to the wrongdoer, he in no way being a party to such contract. The payment of the principal of the insurance policy by the insurer is a risk which he has assumed and for which he has been fully compensated. Especially do we think this rule should be applied to the facts in this case because it appears that appellant has an actual interest, by reason of the nature of the insurance; for any recovery herein against respondent will be paid to appellant and other members of the club *pro rata* in the proportion that the tonnage of its boats and the contributions entered by it bear to the whole. The appellant was in a measure the insurer of its own liability.

It is respondent's next contention that the cases which appellant relies upon as holding that, under the facts in this case, the insured can bring an action in his own name against the wrongdoer, proceed upon the theory that a judgment in favor of the assured will be a defense to any further action by the insurer for the same wrong, and that this doctrine was expressly repudiated in the *Broderick* case, *supra*. This assertion, however, need not be considered, as we have shown that the *Broderick* case is by no means in point and not an authority on the legal problem here involved.

This disposition of the case makes it unnecessary to discuss other assignments of error raised by appellant.

The judgment is reversed and the cause remanded for further proceedings not inconsistent herewith.

MORRIS, C. J., MOUNT, PARKER, and FULLERTON, JJ., concur.

[No. 13676. Department One. January 4, 1917.]

FRANK B. EDES, *Appellant*, v. THOMAS HALEY *et al.*, *Respondents*.[1]

MANDAMUS—WHEN LIES. Mandamus lies only to compel the performance of clear duties that already exist, and to serve some useful purpose.

ELECTIONS—CANVASSING BOARDS—POWERS — RETURNS — STATUTES. Under Rem. Code, § 6424, imposing upon a canvassing board for an irrigation district election the usual duties of such boards to open the returns, estimate the vote, and declare the result, the board has no power to go behind the return certified by the election officers and examine the ballots.

SAME—BALLOTS—VALIDITY—CERTAINTY. Where two officers were to be elected in an irrigation district, one for a short term and one for a long term, and the ballots failed to designate the term of office for which the several candidates were nominated, the election is void for uncertainty, and evidence cannot be taken to show the intent of the voters.

[1]Reported in 162 Pac. 50.

Appeal from a judgment of the superior court for Kittitas county, Grady, J., entered May 31, 1916, dismissing a proceeding in mandamus to a canvassing board, upon striking parts of the affidavit. Affirmed.

Short & Gleysteen and *Hovey & Hale*, for appellant.

Bogle, Graves, Merritt & Bogle, for respondents.

WEBSTER, J.—The Kittitas reclamation district is an irrigation district organized under the laws of this state. Its business and affairs are conducted by a board of three directors, who hold office for three-year terms, but such terms expiring so that one new director is chosen each year. In December, 1914, no election was held and one director held over. In December, 1915, an election was held at which there were to be chosen one director for a full term of three years and one for the unexpired two years of the term for which no one was chosen the previous December. At this election, there were four candidates, viz.: Edes, Casey, Catlin, and Roseburg. No provision is made by the statute for a form of ballot to be used at such elections. At the 1915 election, the ballots used failed to designate the term of office for which the several candidates were nominated or to which they were seeking to be elected. Consequently, when such a ballot was marked and cast, there was nothing on its face to indicate which candidate was voted for for the full term and which for the unexpired term. The election returns, made and certified by the precinct election officers, stated merely that 174 votes had been cast for each Edes and Casey and 160 votes had been cast for each Catlin and Roseburg.

On December 20, the canvassing board met, examined the returns, and proceeded to open and pass upon the original ballots cast at the election and, as the result of the canvass and count so made, declared that Catlin had been elected for the full term and Roseburg had been elected for the two-year term. Thereafter, on January 4, Catlin and Boedcher, two members of the canvassing board, sitting as such, passed a

resolution by which the action of the board theretofore taken was rescinded, upon the ground that the board had exceeded its authority in going behind the certified returns, and then declared that, from the election returns as certified to the board, it could not be determined for what offices or terms the votes cast for the various candidates were intended, and that consequently there had been no election of directors for the district. Whereupon appellant instituted this proceeding in mandamus, setting forth in his affidavit the facts heretofore stated and in addition the following: That, at and prior to the time of holding the election, a large number of electors in the district desired to change the personnel and policy of the board of directors by electing men who were opposed to selling certain district bonds which theretofore had been voted; that, by common consent of the electors so disposed, appellant was nominated to oppose Catlin for the three-year term and Casey was nominated to succeed Boedcher and serve the two-year term; that the district had been divided into four election precincts and that, from the time of its organization, there had been a custom to elect one director who resided in precinct 1, one who resided in precinct 2, and one who resided in either precinct 3 or 4; that both appellant and Catlin resided in the territory embraced within precincts 3 and 4, and that both Casey and Roseburg resided in precinct 1; that the electors who voted for appellant and Casey intended to vote for appellant for the three-year term and for Casey for the two-year term, and that the precinct election officers and the members of the canvassing board knew these facts; that, notwithstanding, the canvassing board refused to declare appellant elected to the office of director for the three-year term or at all. Appellant prayed for a writ of mandate directed to the canvassing board commanding it to legally canvass the returns of the election and to declare appellant elected to the office of director for the three-year term.

Respondents moved to strike from the affidavit all of the extraneous facts heretofore set forth, viz.: The desire to change the personnel and policy of the board and the means employed to effect that change, the prevailing custom to elect directors who resided in different parts of the district, the place of residence of the various candidates, the intention of the voters in casting their ballots, and the knowledge of these facts possessed by the individual members of the board. This motion was granted upon the theory that, however pertinent such matters might be in some other form of proceeding, they had no proper place in a mandamus action. Appellant refused to file an amended affidavit and the court, on motion, treated such refusal as an election by appellant to stand on the original affidavit, and dismissed the action. Appellant brings the case here.

The sole question to be decided is whether the lower court erred in striking from the affidavit the matter indicated. Section 6424, Rem. Code, defining the duties of the canvassing board for such districts, is as follows:

"The canvass must be made in public and by opening the returns and estimating the vote of the district, for each person voted for, and declaring the result thereof."

It will be seen that the duty imposed is the one usually devolving on such boards. It is elementary that it is not the office of a writ of mandamus either to confer powers or to impose duties. It may be employed only to compel the exercise of powers or the performance of clear duties which already exist. Stated in other words, mandamus will not lie to compel a board or tribunal to do that which it could not lawfully do without such mandate. Neither will it issue to compel the performance of an act which can accomplish no useful purpose. It seems too plain to justify argument that the canvassing board under the statute quoted would have no power voluntarily to go behind the returns of election as certified by the precinct officers, and it is equally plain that, if it had such power, no useful purpose could be accomplished

by its exercise. Differing terms make different offices though the title be one. *Wilson v. Blake*, 169 Cal. 449, 147 Pac. 129, Ann. Cas. 1916D 205. The form of ballot used at the election in question renders not only the returns made by the election officers void for uncertainty, but the ballots as cast also. What possible assistance could be obtained by an inspection of such ballots? To follow appellant's contention and afford him relief based upon the existence of the facts which were stricken from his affidavit, it would be necessary for the canvassing board to sit and take evidence bearing upon the question of what was the intention of the voters in casting their ballots; or to do as appellant suggests, take into consideration prevailing customs and generally well known facts and the personal information possessed by the individual members of the board, and in the light thereof declare the results. To do this would be to hold a new election under the guise of canvassing the returns of one already held. Neither argument nor citation of authority is necessary to demonstrate that this contention is unsound.

Affirmed.

Morris, C. J., Main, Ellis, and Chadwick, JJ., concur.

[No. 13680. Department Two. January 4, 1917.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE E. BANKS, *Appellant*.[1]

CRIMINAL LAW—ABATEMENT OF ACTION—DEATH. A criminal action abates on the death of the accused pending appeal, in the absence of any statute on the subject.

Appeal from a judgment of the superior court for King county, Mackintosh, J., entered April 8, 1916, upon a trial and conviction of unlawfully selling intoxicating liquors. Appeal dismissed.

Fred C. Brown, for appellant.

Alfred H. Lundin, *John D. Carmody*, and *Joseph A. Barto*, for respondent.

MOUNT, J.—The appellant was convicted in the lower court of the crime of unlawfully selling intoxicating liquors. Upon this conviction, the trial court imposed, as punishment, a fine of fifty dollars and costs. Pending the appeal, the appellant died. His death was suggested at the oral argument, but we were invited to pass upon the questions presented upon the briefs.

In the case of *State v. Furth*, 82 Wash. 665, 144 Pac. 907, we said, at page 667:

"The courts of the country, both state and Federal, have, with marked unanimity, held that the death of the defendant in a criminal case pending appeal, in the absence of a statute expressing the contrary, permanently abates the action and all proceedings under the judgment. They make no distinction between a sentence of imprisonment and the imposition of a fine. The underlying principle is that the object of all criminal punishment is to punish the one who committed the crime or offense, and not to punish those upon whom his estate is cast, by operation of law or otherwise."

[1]Reported in 161 Pac. 1189.

A number of cases were cited to support that rule. We decided that case on the merits, because we were invited by counsel to do so, "and because the case is pending in the trial court against other defendants." The last named reason was the only justification for passing upon the merits. There is no such condition here. The action has abated by the death of appellant, and must, for that reason, be dismissed.

MORRIS, C. J., HOLCOMB, FULLERTON, and PARKER, JJ., concur.

[No. 13758. Department One. January 4, 1917.]

WALTER G. RONALD, *as Trustee etc., Appellant*, v. RALPH SCHOENFELD, *Respondent*.[1]

CORPORATIONS—INSOLVENCY—ASSETS—OWNERSHIP OF STOCK—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY. In a trustee's action against a stockholder to recover assets of an insolvent corporation, the burden is upon the stockholder to prove by clear and convincing evidence that he held the stock as collateral security; and his oral testimony, corroborated by witnesses hostile to the corporation, to the effect that his note for $2,000 was given by him as a loan to the corporation instead of as payment for the stock, is not sufficient to overcome the presumption and the written records of the corporation that the stock was owned by him.

SAME—SOLVENCY. The test of the insolvency of a corporation is its inability to pay its debts in due course of business.

SAME—INSOLVENCY — OFFICERS — PREFERENCES — NOTICE OF CONDITION. Knowledge of an insolvent condition is imputed to an officer of a corporation, and he cannot profit at the expense of other creditors by having an auto truck turned over to himself in payment of a loan which he made to the company while the company was insolvent.

SAME—INSOLVENCY—ASSETS—RECOVERY—LIMITATIONS. A trustee in bankruptcy, endeavoring to assemble the assets of an insolvent corporation for the benefit of creditors, is not affected by laches of the officers of the corporation in bringing suit on a claim against a stockholder, but may sue at any time within the period of the statute of limitations.

[1]Reported in 162 Pac. 43.

Appeal from a judgment of the superior court for King county, Jurey, J., entered February 28, 1916, upon findings in favor of the defendant, in an action to recover assets of an insolvent, tried to the court. Reversed.

Leopold M. Stern (*J. W. Russell*, of counsel), for appellant.

James Kiefer, for respondent.

CHADWICK, J.—This action was brought by the trustee in bankruptcy of the Sol Duc Mineral Water Company, an insolvent corporation, against the respondent to recover the value of an automobile truck, delivered to respondent by the acting manager of the concern prior to the time a receiver was appointed in the state courts to take charge of the affairs of the corporation and prior to the time bankruptcy proceedings were instituted in the Federal court.

The court found that the respondent had loaned the company $2,000, in April, 1914; that the truck was turned over to him in November, 1914, by bill of sale, executed by the manager of the company, as security for the debt; that the truck had been sold, and that the amount realized, $2,000, less $130 storage, had been credited upon the indebtedness.

Whether the insolvent company was obligated to the respondent, was vigorously contested by the appellant trustee, his contention being that respondent had subscribed for an additional 2,000 shares of the stock of the corporation; that, to pay for it, he gave the note of the Standard Furniture Company of which he is an officer, payable to the Seattle National Bank. The note was negotiated by the insolvent at the bank to which the note was made payable. Appellant further contends that, when the affairs of the company became uncertain, respondent took the position that his obligation was a loan to the company, and was not a payment for the subscribed stock.

It seems immaterial to us whether the $2,000 transaction be regarded as a loan, or as a payment for additional stock.

Respondent was, at all times, a trustee and familiar with the affairs of the company. The court held that the company was not insolvent at the time the truck was turned over to respondent. A careful reading of the record convinces us that the judgment of the court cannot be sustained, either in law or in fact.

It would serve no purpose to review, in detail, the testimony offered by the parties upon the question whether the $2,000 was paid in upon a stock subscription or given as a loan to the company. It is enough to say that the finding of the court is contrary to all of the written testimony and concomitant circumstances, as well as the probabilities attending the acts and conduct of men skilled in business affairs such as the participants on either side of the controversy are admitted to be. It is true that respondent testifies that the money was advanced as a loan. He is sustained, in a degree, by two witnesses who admit their hostility to the company, and whose testimony (one of them at least) is clouded by evident self-contradiction. This is not enough to overcome the presumption that the stock, which was a part of an additional issue, was issued to the respondent as a subscriber. No note or memorandum evidencing the obligation which he now asserts was taken, and no entry upon the books of the company, which were in the keeping of one of his witnesses, showing a credit to the account of bills payable or to the personal account of respondent, is made to appear.

The burden in such cases is not, as assumed by the trial judge, upon the creditor to prove, by a preponderance of the evidence, that one who holds corporate stock is not holding it as collateral security. It is upon the holder to prove, by clear and convincing evidence, that the stock does not speak the truth of ownership. It has long been held to be contrary to the policy of the law to permit an apparent owner of stock in a corporation to deny his liability, or to assert that he holds his stock as a trustee, or as collateral to some obligation that is not obvious upon the face of the corporate records,

or sustained by convincing testimony. The cases and the texts are of one accord upon this proposition.

"An absolute transfer of stock may be shown by parol evidence to be really a pledge if it is collateral security for a debt, but the evidence in such case should be clear and convincing." Jones, Collateral Securities (3d ed.), § 155.

See, also, *Murray v. Butte-Monitor Tunnel Min. Co.*, 41 Mont. 449, 110 Pac. 497, 112 Pac. 1132; *Wilson v. Cunningham*, 24 Utah 167, 67 Pac. 118; *McLeod v. Weldon*, 1 New Brunswick Eq. 181; *Travers v. Leopold*, 124 Ill. 431, 16 N. E. 902.

The same principle applies to and binds one who becomes a subscriber to stock before it is issued. It was so held in *Davies v. Ball*, 64 Wash. 292, 116 Pac. 833, Ann. Cas. 1914B 750. After all, it amounts to no more than a declaration of the settled law that a transaction depending upon a written instrument, fair upon its face, will not be overcome unless by testimony so unequivocal as to put the issue beyond reasonable controversy.

Wherefore, the oral testimony of respondent and his witnesses being overcome by the written record made by him and by them, he has failed in his burden of proof and cannot now claim that he held the stock in pledge as a security for a debt.

But if we treat the payment of the $2,000 as a loan, respondent is in no better position. The trial judge says that the financial state of the company was the same in October and November, 1914, as in the following July when a receiver was appointed because of its continued insolvency. He sustains his finding by suggesting that, although this be so, the company was derelict in that it did not begin an action during the months intervening between the time when the actual condition of the company was made known to the stockholders and the time when the receiver was appointed. It is abundantly proven by the testimony of witnesses on both sides, and by the admissions of respondent himself, that the company was not able to pay its debts in due course of

business. Such is the test of insolvency adopted by this court in *Nixon v. Hendy Machine Works*, 51 Wash. 419, 99 Pac. 11.

Respondent, being an officer of the company, knew of the financial condition of the company; or if he had no actual knowledge, the law will impute such knowledge to him and deny him the privilege of profiting at the expense of the general creditors of the concern. *Potvin v. Denny Hotel Co.*, 26 Wash. 309, 66 Pac. 376; *Barnard Mfg. Co. v. Ralston Milling Co.*, 71 Wash. 659, 129 Pac. 389.

Nor would the fact that an action was not brought until a receiver had been appointed avail respondent anything. The trial judge was disposed to treat the case as a controversy between contending stockholders, and to measure the credibility of the principal witnesses. With this phase of the case, we have no concern. It was the duty of the receiver to assemble all of the assets of the corporation and to ferret out and overcome all preferences without reference to the attitudes of the officers and trustees of the company. It was his privilege, as well as his duty, to proceed at any time within the period of limitation. This is not an action between officers and trustees, but the suit of creditors, through an officer of the court.

This holding disposes of the contention that the president of the company directed the manager to turn over the truck to the respondent as security for his debt, for the same rule which prevents respondent from taking an asset of the insolvent corporation, would also prevent an officer from delivering it to him.

The judgment is reversed, with directions to enter a judgment in favor of appellant for the sum of $2,000 which we find from the testimony to be the value of the truck.

MORRIS, C. J., MAIN, MOUNT, and ELLIS, JJ., concur.

[No. 13828. Department Two. January 4, 1917.]

THE STATE OF WASHINGTON, *on the Relation of W. W. Robinson Company, Plaintiff*, v. MITCHELL GILLIAM *et al., Respondents.*[1]

ATTORNEY AND CLIENT—ATTORNEY'S LIEN—POSSESSION OF PAPERS—BOND—STATUTES. Under Rem. Code, § 137, providing that the court may require an attorney to deliver over money or papers received in the course of his employment, and § 138, providing that, if the attorney claims a lien, the court may fix the amount of security to be given by the client to satisfy the lien or may summarily inquire into the facts on which the lien is founded, it is error, on application of the client for the delivery of money, books, and papers, for the court to do neither and to dismiss the proceedings, on the theory that the rights of the parties could be tried out in the attorney's action for fees and expenses; since the client was entitled to his property pending such litigation.

Application filed in the supreme court November 13, 1916, for a writ of mandamus. Granted.

J. L. Corrigan, for relator.

Jay C. Allen, for respondents.

MOUNT, J.—This is an application for a writ of mandamus to require the trial court to fix the amount of a bond to be furnished by the relator, and to enter an order, upon such bond being furnished, requiring the respondent Olson to deliver certain money and property to the relator.

It appears that, in the year 1915, certain accounts were delivered by an agent of the relator to Mr. Olson for collection; that thereafter Mr. Olson collected one of these accounts, amounting to $75, and assigned another account for $729.10, and collected that amount upon such assignment; that afterwards, in October, 1916, the relator demanded all books, papers, documents, and money, belonging to it, from Mr. Olson, who refused to deliver the same on demand; that thereafter a petition was filed with the superior court of

[1]Reported in 161 Pac. 1194.

King county stating these facts, and praying for an order upon Mr. Olson to deliver the money, books and papers to the relator. In answer to this petition, Mr. Olson filed a general demurrer, supplemented by an affidavit, admitting that he was an attorney-at-law; that he had been employed to collect certain accounts belonging to the relator; that he had collected accounts and performed other legal services; that he had rendered a statement of account to the relator for a balance of $156.10, after appropriating all the money he had collected. In his affidavit, he further stated that he had assigned his account to one B. Campbell for collection; that Campbell, after the petition was filed, had brought an action against the relator to recover the amount of the attorney's fees due to Mr. Olson; and that the moneys collected and papers and books in his possession were held by him to secure an attorney's lien. Upon substantially these facts, the trial court dismissed the petition, whereupon application is made here for this writ.

The statute (Rem. Code, § 137) reads as follows:

"When an attorney refuses to deliver over money or papers to a person from or for whom he has received them in the course of professional employment, whether in an action or not, he may be required by an order of the court in which an action, if any, was prosecuted, or if no action was prosecuted, then by order of any judge of a court of record, to do so within a specified time, or show cause why he should not be punished for a contempt."

Section 138 (Rem. Code) provides as follows:

"If, however, the attorney claim a lien upon the money or papers, under the provisions of this chapter, the court or judge may,—

"(1) Impose as a condition of making the order that the client give security, in a form and amount to be directed, to satisfy the lien, when determined in an action;

"(2) Summarily to inquire into the facts on which the claim of a lien is founded, and determine the same; or

"(3) To refer it, and upon the report determine the same as in other cases."

It seems clear from a reading of these sections that, when the claim of lien was made upon the money and papers in the attorney's hands, then the court should have proceeded summarily to inquire into the facts upon which the claim of lien was founded and determined the same. The least the court should have done was to fix the amount of a bond to secure the attorney for whatever lien he might have, and to require the money and papers in the hands of the attorney to be delivered to the relator. The court refused to do either, but dismissed the proceedings, no doubt upon the theory that the rights of the parties would be tried out in the action upon the assigned claim for attorney's fees and expenses; but, pending that litigation, it is plain, under the terms of the statute, the relator is entitled to its property upon the filing of a bond to secure the attorney for whatever fees he shall be entitled to. It was the intention of the statute that the client should have his property immediately, and that the attorney might rest secure that he would obtain his reasonable fees. No harm can come to the attorney if the bond is given. Irreparable loss may occur to the relator if the property in the hands of the attorney is not delivered to the relator. We are satisfied that it was the duty of the trial court to proceed summarily and determine the amount of the attorney's fees, if any. Not having done so, it was clearly a duty to fix the amount of the bond which might be given by the relator to secure such fees pending their determination. The relator, under the statute, is clearly entitled to have the court fix a bond, and upon the giving of such bond, to require the attorney to immediately deliver the moneys and papers and books which belong to the relator. It is so ordered. The costs of this application to be taxed against the respondent Olson.

MORRIS, C. J., HOLCOMB, PARKER, and FULLERTON, JJ., concur.

[No. 13597. Department Two. January 8, 1917.]

SPOKANE VALLEY LUMBER AND BOX COMPANY, *Appellant*, v. G. W. DAWSON *et al.*, *Respondents*.[1]

MECHANICS' LIENS—NOTICE TO OWNER—NECESSITY. Where materials are furnished to the owner upon the order of the owner's general agent in full control and management of the lands, it is not necessary to give the owner the five days' written notice of the delivery of the materials provided for by Rem. Code, § 1133.

Appeal from a judgment of the superior court for Spokane county, Blake, J., entered May 5, 1916, upon findings in favor of the defendants, denying the foreclosure of a mechanics' lien, tried to the court. Reversed.

J. E. McAndrew, for appellant.

MORRIS, J.—Appeal from a decree denying the foreclosure of a materialman's lien. The essential facts are as follows:

Respondents are husband and wife, residing upon lands near Spokane which are the separate property of the wife. For many years the respondent has acted as the general agent of the wife in the full control and management of these lands, cultivating the same, marketing the crops, collecting the moneys due thereon, and purchasing supplies. In July, 1913, the respondent husband ordered from the appellant certain material for use in the construction of a building upon the lands. The materials were delivered upon the premises, used in the construction of the building, and, not being paid for, a lien was filed and this action brought to foreclose the same. It appearing that the wife was the owner of the lands, and appellant not having, within five days after the first delivery of materials, given written notice to the wife of the furnishing of the materials, as provided for in Rem. Code, § 1133, the lower court was of the opinion that the lien was unenforcible, and so held, although render-

[1]Reported in 161 Pac. 1191.

ing judgment against each respondent for the purchase price of the materials.

The refusal of foreclosure was error. We have held whenever this question has been before us that, when the materialman furnishes material to the owner, either directly or through an agent of the owner, the statute in question has no application. *Rieflin v. Grafton*, 63 Wash. 387, 115 Pac. 851; *Architectural Decorating Co. v. Nicklason*, 66 Wash. 198, 119 Pac. 177; *Hewitt-Lea Lumber Co. v. Chesley*, 68 Wash. 53, 122 Pac. 993; *Brace & Hergert Mill Co. v. Burbank*, 87 Wash. 356, 151 Pac. 803. There is no question here but that the husband was the wife's agent in the purchase of this material and that delivery was made to the wife. The case is ruled by those cited.

Respondents have not appeared in this court, but appellant's brief suggests that the lower court was of the opinion that in *Hays v. Montesano Mill Co.*, 85 Wash. 604, 148 Pac. 881, this court had departed from the rule of the cited cases. It was not so intended, nor can we so read the *Hays* case when the language there used is applied to the facts before the court, which must always be done to clearly interpret any ruling. In that case, certain machinery was installed by the lessee of a mill. Failing to pay for the same, a lien was sought to be foreclosed against the fee. No notice was given to the owner of the fee of the furnishing of the material, and it was sought to avoid this defect by a contention that the lessee was the agent of the owner for the purpose of improving the property, and hence the owner was not entitled to notice. Finding no agency in this relation, we held otherwise, and while perhaps, as in many cases, the language used, disassociated from the facts, may lead to the belief that the court was holding that notice to an owner was necessary even though the sale was made to the owner through his agent, it is evident it was not so intended, as no reference was made to the previous cases holding no notice is necessary in such a case, nor is any reference made to this case as establishing

a contrary rule in the subsequent case of *Brace & Hergert Mill Co. v. Burbank, supra.* All that could be held in the *Hays* case, and all that was intended, was that the lessee of a mill property could not so bind the owner of the fee in installing machinery as to render it unnecessary to serve written notice upon the owner in an attempt to subject the fee to a materialman's lien. It will be seen at once that such a holding does not conflict with the rule that where, as here, the material is furnished to the owner though ordered by an agent, the serving of written notice is not necessary to bind the owner.

The judgment is reversed, and the cause remanded with instructions to enter a decree of foreclosure.

HOLCOMB, PARKER, FULLERTON, and WEBSTER, JJ., concur.

[No. 13612. Department Two. January 8, 1917.]

SAM GUSTAV, *Respondent*, v. JAMES D. ESARY, *as Receiver etc., Appellant.*[1]

RECEIVERS—DISCHARGE—EXHAUSTING ESTATE. Where a receiver had completely exhausted the estate in complying with prior orders, he cannot be required to pay a claim filed with his attorney of which he had no notice prior to his discharge, the impossibility of paying as receiver being due to no fault of his own.

Appeal from an order of the superior court for King county, Tallman, J., entered November 10, 1914, committing a receiver to jail as for contempt, in case of failure to comply with an order requiring payment of a claim against an insolvent estate. Reversed.

Byers & Byers, for appellant.

Cole & Dolby, for respondent.

MORRIS, J.—In January, 1911, appellant was appointed receiver of the Three Tree Point Gravel Company. In

[1]Reported in 161 Pac. 1188.

October following, he made his final report to the court and, with his bondsman, was discharged. In September, 1913, respondent filed a petition praying that the order of discharge be set aside upon the ground that respondent had filed a claim with the receiver which had been allowed by the court and which had not been paid. A hearing was had upon this petition, after various objections on the part of appellant, when it appeared that respondent's claim, while filed with the attorneys of the receiver, was not called to the attention of the receiver, and that for this reason it was not included in his final report, and no provision made for its payment. It was further shown that, acting under the orders of the court, the receiver had paid out all the moneys, save a few cents, of the insolvent corporation coming into his hands, and had exhausted its assets. The lower court thereupon entered an order vacating the order of discharge, and required the receiver to pay respondent's claim, with interest and attorney's fees. The appellant did not comply with this order, and the court thereupon issued a show cause order requiring him to comply with the prior order of payment or subject himself to contempt. Appellant appeared in response to this order and again made a showing of no funds or property. The lower court found appellant had no means of complying with the order of payment, that all funds and property coming into his hands had been paid out in accordance with the previous orders of the court, but notwithstanding, ordered the appellant to pay respondent's claim, or, in default, stand committed to the county jail. Notice of appeal was given, and the case is here for review.

Many interesting legal questions, jurisdictional and otherwise, are argued by respective counsel, which, in view of the conclusion we have reached, will not be referred to. We are of the opinion that, when it appeared that the insolvent estate had been completely exhausted in complying with the prior orders of the court, and that it was impossible for the appellant, as receiver, to make the payment required of him,

the proceedings should have been dismissed. The court should not, in the alternative, require its officer to do that which is impossible, when the impossibility arises through no fault of the officer and is occasioned through executing prior orders of the court, or be punished for contempt. Finding in this a sufficient reason for reversing the judgment, we refrain from discussing other points.

The judgment is reversed.

MOUNT, FULLERTON, HOLCOMB, and PARKER, JJ., concur.

[No. 13682. Department Two. January 11, 1917.]

Z. A. SCOUSE *et al.*, *Appellants*, v. ALASKA & YAKIMA INVESTMENT COMPANY *et al.*, *Respondents*.[1]

FRAUDULENT CONVEYANCES—EVIDENCE—BURDEN OF PROOF. Upon an issue as to whether property belonging to a judgment debtor had been put into the name of a corporation to defraud creditors, the burden of proof is upon the plaintiff to establish the fraud and overcome the presumption of good faith in favor of ordinary business transactions by clear and satisfactory evidence.

APPEAL—REVIEW—FINDINGS. Where the witnesses disagree upon the facts and the court is largely controlled by the apparent credibility of the witnesses, the supreme court will not disturb the findings unless satisfied that the trial court was wrong in its conclusions.

MORRIS, J., dissents.

Appeal from a judgment of the superior court for Yakima county, Grady, J., entered July 29, 1916, in favor of the defendants, dismissing an action to subject real property to the satisfaction of a judgment, tried to the court. Affirmed.

Willett & Oleson, *O. L. Willett*, and *Englehart & Rigg*, for appellants.

H. J. Snively, for respondents.

[1]Reported in 161 Pac. 1189.

MOUNT, J.—This action was brought to subject certain real estate, held in the name of Alaska & Yakima Investment Company, in the county of Yakima, to the satisfaction of a judgment obtained by the plaintiffs against Belinda A. Carbonneau. Upon issues joined, the case was tried to the court without a jury. At the conclusion of a lengthy trial, the court decided that the property in question was not the property of Belinda A. Carbonneau, and that she had no interest therein, but was the property of the Alaska & Yakima Investment Company, a corporation, and that the money which purchased the real property belonged to immediate relatives of Mrs. Carbonneau, and for that reason dismissed the action. The plaintiffs have appealed from the order of dismissal.

The controlling question in the case is whether the property is really the property of Mrs. Carbonneau, and was by her put into the name of the corporation, of which her immediate relatives were the stockholders, for the purpose of defrauding her creditors. This, of course, is purely a question of fact, and the burden of proof rests upon the appellants. The writer of this opinion has, with care, read the lengthy abstract of the evidence, and is not satisfied therefrom that the trial court was wrong in his conclusions.

We shall not discuss the evidence. To do so would necessitate a lengthy and involved opinion, and, as said by the trial court, such opinion "could be, at most . . . an argument in vindication of the views entertained," and would not declare or define any rule of law. The appellants argue that, because of the many improbabilities, misstatements, and contradictions of the witnesses who testified in behalf of the respondents, the trial court was not justified in basing a conclusion upon their testimony. An examination of the record shows that there were many contradictions, many improbable statements, and many imperfections in the testimony of respondents' witnesses, but it also shows that the occurrences about which they testified had taken place from eight to ten

years prior to the time the testimony was given. It is not uncommon for witnesses to disagree upon facts which occurred years before. In cases like this, where the controlling facts are in dispute, where witnesses disagree, where statements are improbable, the court is controlled largely by the apparent credibility of the witnesses. This credibility is necessarily determined by the demeanor and general appearance of the witnesses, as well as their statements. The trial court was in a better position to judge of these things than we are, and while we may say that, if the trial court had rendered a judgment in favor of these appellants upon the facts before us, we would feel bound to affirm the judgment, yet, when the trial court has found in favor of the respondents, we feel it equally our duty to affirm the judgment; especially since we are not convinced, from a careful reading of the abstract, which embodies all the facts in the case, that the trial court was wrong. In this case, as we have above intimated, the burden was upon the appellant to show that the property in question was really the property of Mrs. Carbonneau, and that the other defendants had no interest therein, and that the same was placed in the corporation in fraud of creditors. The burden of showing these facts rested upon the respondents. In the case of *Rohrer v. Snyder*, 29 Wash. 199, 69 Pac. 748, we said, at page 206:

"It must be borne in mind that there is a presumption of honesty and good faith that prevails in favor of all ordinary business transactions; that fraud is never presumed, but must be established by the party alleging it. Where the good faith of a conveyance is assailed, it is not enough that the evidence may cause a suspicion as to its good faith. The evidence must be clear and satisfactory, and such as convinces the mind that the conveyance is in reality fraudulent."

Upon the record in this case, we are not satisfied that the trial court was wrong in his conclusions, and the judgment is therefore affirmed.

PARKER, HOLCOMB, and FULLERTON, JJ., concur.

MORRIS, J. (dissenting)—To my mind, the facts clearly show appellants are entitled to the relief sought. I therefore dissent.

[No. 13438. Department One. January 13, 1917.]

WALLACE BINGHAM, *as Executor etc., Respondent*, v. S. P. DOMER *et al., Appellants.*[1]

BILLS AND NOTES — PAYMENT—EVIDENCE—SUFFICIENCY. Payment of a note which bore indorsements of principal and interest in the handwriting of the maker, is not proven by receipts and cancelled checks, made on the dates the credits were made on the note, and which might have applied to other transactions between the parties.

SAME—PAYMENT—SERVICES—PLEADINGS. In an action upon a note, services rendered to the payee cannot be shown under a plea of payment.

APPEAL—REVIEW—OBJECTIONS NOT MADE BELOW. A judgment will not be reversed for a small excess in calculating interest, where the objection was first raised on appeal.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered June 14, 1915, upon findings in favor of the plaintiff, in an action on a promissory note, tried to the court. Affirmed.

S. P. Domer, for appellants.

Albert G. Starkey and *Clyde H. Belknap*, for respondent.

PER CURIAM.—The respondent, as executor of the estate of Lucius Bingham, deceased, brought this action against the appellants to recover upon a promissory note. The making of the note was not disputed, the issues turning on the amount due thereon. The note bore certain indorsements of interest and principal in the handwriting of the appellant S. P. Domer. These items the court allowed as credits on the note. The appellants sought to show other items, such as receipts for money paid given by the deceased to the ap-

[1]Reported in 162 Pac. 355.

pellant S. P. Domer, checks drawn in favor of the deceased bearing the deceased's indorsement, and legal services performed by S. P. Domer for the deceased. These the court disallowed, the appellants contend, erroneously.

It is our opinion that the ruling of the trial court should be sustained. The burden of proving payment was upon the appellants. In making proof they were hampered by the statute relating to the exclusion of testimony where one of the parties sues or defends as executor or administrator of another; but giving them the benefit of the most liberal rule, we do not think the evidence justified treating the disputed items as payments on the note. Aside from the fact that certain of the credits on the note were made at the date of these receipts and checks, and were, as we say, in the handwriting of S. P. Domer, other transactions between the parties were shown to which they might equally apply. The value of the services rendered could not be shown as a payment. While the appellants might perhaps set them forth as a counterclaim, had they seen fit to do so, they cannot be shown under a plea of payment.

Complaint is made that the judgment is too large under the court's own theory of the case. The claim is that interest was calculated at an excess of that provided in the note. The amount is not very considerable, and as it is raised for the first time in this court, we do not think it justifies a reversal.

The judgment is affirmed.

[No. 13437. Department One. January 13, 1917.]

WALLACE BINGHAM, *as Executor etc., Respondent*, v. S. P. DOMER *et al., Appellants*.[1]

HUSBAND AND WIFE—JUDGMENT AGAINST HUSBAND—SEPARATE DEBT—FORM—LIABILITY OF COMMUNITY. A provision in a judgment authorizing execution against "any property" of the defendant, personally and as administrator of the estate of a joint obligor, is not erroneous in that it authorizes execution against the community property of defendant and wife; as the provision in question adds nothing to the effect of the judgment, which can only be satisfied from the separate property of the defendant if it is based on a separate debt.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered June 14, 1915, upon findings in favor of the plaintiff, in an action on a promissory note, tried to the court. Affirmed.

S. P. Domer, for appellants.

Albert G. Starkey and *Clyde H. Belknap*, for respondent.

PER CURIAM.—This is a companion case to that of *Bingham v. Domer*, *ante* p. 253, 162 Pac. 355; the distinguishing feature being that the note was signed not only by S. P. Domer, but by H. R. Creighton, now deceased, of whose estate Domer is administrator.

The question with reference to payment is sufficiently discussed in our former opinion. The judgment is a personal judgment against the defendant Domer, he not having been served in his capacity as administrator of the estate of Creighton. The judgment provides, however, that execution issued thereon may be satisfied out of "any property belonging jointly to S. P. Domer and S. P. Domer as the administrator of the estate of H. R. Creighton, deceased." It is

[1]Reported in 162 Pac. 355.

urged that this proviso is erroneous because it authorizes an execution against the community interest of S. P. Domer and Amelia E. Domer in any property owned by them jointly with the estate of H. R. Creighton, deceased. But we cannot so construe it. The proviso adds nothing to the effect of the judgment. If the judgment is based upon the separate obligation of S. P. Domer, it can only be executed against his separate property; if it is based upon a community obligation, the fact may be otherwise; but if so, it depends on the nature of the debt, not upon the proviso against which the complaint is made.

The judgment is affirmed.

[No. 13595. Department One. January 13, 1917.]

EMMA WOMACH *et al.*, *Respondents*, v. AMANDA SANDYGREN *et al.*, *Appellants*, SPRAGUE ROCHDALE STORE COMPANY *et al.*, *Interveners*.[1]

RECEIVERS—APPOINTMENT—CROPS. A *prima facie* case for the appointment of a receiver *pendente lite* is made out, where a cotenant was endeavoring to take charge of certain crops lying in the field at the mercy of the elements, and refused to make any statement or account for the same.

APPEAL—REVIEW—DISCRETION. The appointment of a receiver *pendente lite* on a *prima facie* showing will not be disturbed on appeal in the absence of abuse of discretion.

Appeal from an order of the superior court for Lincoln county, Sessions, J., entered March 21, 1916, appointing a receiver pending an action for partition. Affirmed.

Martin & Jesseph, for appellants.

WEBSTER, J.—Pending an action for partition of lands among tenants in common, respondents moved for the ap-

[1]Reported in 162 Pac. 354.

pointment of a receiver *pendente lite*, and filed in support of the motion an affidavit showing, in substance, that a part of the land was in cultivation and that it was necessary that the same be put in crop for the ensuing season; that certain crops grown during the year 1915 were lying in the field where cut, at the mercy of the elements; that Amanda Sandygren, one of the cotenants, was endeavoring to take charge of the crops and refused to make any statement of the amount of grain grown or to account for same. Amanda Sandygren filed a counter affidavit, in effect denying the affidavit of respondents. On the showing so made, a receiver was appointed to take charge of all crops sown and grown on the premises and to safely keep the same until the final determination of the action.

The affidavit in support of the motion presents a *prima facie* case for the appointment of a receiver and, upon the record before us, we are unable to say that the trial court abused its discretion in the premises.

Affirmed.

ELLIS, C. J., MORRIS, MAIN, and CHADWICK, JJ., concur.

[No. 13513. Department One. January 13, 1917.]

ANNIE F. MORRILL, *Respondent*, v. TITLE GUARANTY & SURETY COMPANY *et al.*, *Respondents*, AGNES L. GUERNSEY *et al.*, *Appellants*.[1]

MORTGAGES—DISCHARGE—REFUSAL—DAMAGES — STATUTES. Where property was conveyed to a surety company by a trust deed as security for going upon a contractor's bond, and after completion of the work the surety company refused to redeed the property until its value had depreciated, the right of the grantor to recover for the loss by depreciation is limited to the sum of $25 by Rem. Code, § 8799, which provides that a mortgagee failing upon demand for sixty days to discharge a mortgage that has been fully satisfied shall forfeit and pay to the mortgagor the sum of $25, to be recovered in any court of competent jurisdiction; since the effect of the statute is to substitute remedies and the same is intended as compensation to the mortgagor as well as a punishment to the mortgagee, and is not strictly a penalty.

SAME—DISCHARGE—TRUST DEED. Where a deed is made to a trustee who holds title as security for a liability, the trustee is held to the same rule that governs mortgages, and must tender a satisfaction piece.

SAME—DISCHARGE—REFUSAL TO GIVE—EXCUSES. Where a trust deed was held by a surety company to secure against liability upon a contractor's bond, a claim for $500 for attorney's fees and costs expended by the surety company in a suit to restrain payments on the contract arises out of an independent proceeding not defined by the deed, and hence is no excuse for withholding a reconveyance of the security after all liability on the bond is fully satisfied.

SAME—DISCHARGE—DAMAGES—ACTIONS—PLEADING. A cross-complaint against a mortgagee for withholding a discharge after satisfaction is not demurrable for mistaking the measure of damages in seeking the amount of the depreciation in the value of the property rather than the statutory penalty.

APPEAL—REVIEW—AMENDMENTS—DECISION. Where the facts are before the supreme court, it is not necessary to remand with permission to make a permissible amendment of a cross-complaint, but judgment may be given "as the justice of the case requires," under Rem. Code, § 406.

[1]Reported in 162 Pac. 360; 163 Pac. 733.

ON PETITION FOR REHEARING.

MORTGAGES—DISCHARGE—REFUSAL—PENALTY—RIGHT OF ACTION—STATUTES. Rem. Code, § 8799, which provides a compensatory penalty of $25 for a mortgagee's failure to discharge a mortgage that has been fully satisfied, does not give a new right of action, but is merely a substitution of a penalty in the way of damages for the general relief allowed in equity, and affects the measure of damages only.

TRIAL—QUESTION FOR COURT OR JURY—ASSESSMENT OF PENALTY. Where the facts show a mortgagor entitled to recover the $25 penalty provided by Rem. Code, § 8799, for failure to discharge a satisfied mortgage, the assessment of the damages is a matter of law for the court without testimony.

PLEADING—AMENDMENT—DEPARTURE—MISTAKE AS TO MEASURE OF DAMAGES—MORTGAGES—DISCHARGE. Where a cross-complaint against a mortgagee for wrongfully withholding a discharge of a satisfied mortgage sets forth all the facts necessary for a recovery of the penalty provided by Rem. Code, § 8799, but asks judgment for the loss sustained by reason of a depreciation in the value of the property, thus mistaking the measure of damages, it is not a departure to treat the cross-complaint as amended and give judgment for the penalty, although the statute was not pleaded; since there was but one state of facts to be pleaded and no choice of remedies, and the measure of damages was a question of law and not of fact, error as to which does not turn a litigant out of court.

Appeal from a judgment of the superior court for Clarke county, Linn, J., entered November 15, 1915, in favor of certain defendants, upon dismissing the cross-complaint of the mortgagors claiming damages for refusal to reconvey property held under a trust deed, in an action to foreclose a mortgage. Reversed.

Henry Crass, for appellants.

James B. Murphy and *Robt. C. Saunders*, for respondent Title Guaranty & Surety Company.

CHADWICK, J.—W. F. Guernsey, the appellant husband, in company with one Kincaid, under the firm name of Guernsey & Kincaid, obtained a contract to construct a part of the Pacific highway, known as state aid road No. 61, in King county. Under the law, the contractor is required to

give a bond conditioned for the faithful performance of his contract. Respondent Title Guaranty & Surety Company became surety for Guernsey and Kincaid. This respondent will be referred to as the surety company. To secure it from possible liability upon the bond, it took a deed to a certain block of land situate at Vancouver, Washington. The deed was taken in the name of an employee, who is admitted to be a trustee for the company. A trust was declared in writing by appropriate words:

"Now, therefore, it is specifically understood and agreed that said conveyance and transfer was made for the express purpose of insuring the Title Guaranty & Surety Company against loss on the above contracts and as soon as the above contracts have been performed and all liability for loss has ceased, then the said The Title Guaranty & Surety Company, by its duly authorized agent, John R. Scott, shall redeed and reconvey unto said W. F. Guernsey and A. L. Guernsey, his wife, all the right, title and interest in and to all property conveyed by reason of the foregoing contract."

The road contract was completed in September, 1911. The contractors had not met all the claims, and it coming to the knowledge of the surety company that the contractors had assigned all moneys due and to become due upon the contract to M. M. Morrill, a banker at Kent, Washington, it began an action in the Federal court to restrain the state from making further payments, and all others from disbursing any funds on hand until the right of the claimants and creditors could be ascertained. Thereafter all parties met, counsel being present, and it was agreed, in consideration of a dismissal of the suit and a release of the impounded funds, that Morrill should pay all claims and demands against road No. 61.

In June, 1912, Morrill took a mortgage from Guernsey and wife to secure an indebtedness growing out of Guernsey's road contracts, in the sum of $5,270. This action was brought by the mortgagee, the wife of Morrill, to foreclose the mortgage. Issues have been framed between the

defendants. We shall briefly state the facts and disputations out of which they arise. It is contended by appellants that, at the time it was stipulated that the injunction suit should be dismissed and Morrill engaged to pay all the claims arising out of road No. 61 contract, all the claims were listed and understood by all parties; that thereafter, in January, 1912, all parties and counsel for the company being present, all just and lawful claims against the firm of Guernsey and Kincaid were paid and discharged by Morrill; and that Guernsey then and there demanded a reconveyance of the property held in trust, and that counsel for the company said he would take the matter up with the home office. Other demands, oral and by way of letters, were thereafter made, and finally, on March 19, 1915, a formal written demand was made upon the company for a reconveyance of the property. The testimony clearly shows that the property had greatly depreciated in value since January, 1912, in consequence of a general slump in real estate values. Appellants pray for damages in the total sum of $7,822.50, for depreciation, loss of sale, and taxes and interest paid.

The company asserts that no demand for a reconveyance was made at the time of the settlement; that there was no understanding that all of the claims were known, and that it was impossible that it could be so, for Guernsey & Company, a company of which appellant husband was the manager, had defaulted on No. 69 state aid road, which abutted No. 61 on the south, upon which it was surety, the work on the two contracts having been carried on at the same time and as if it were one contract; that it was impossible to know whether all claims had been discharged on No. 61 until all had been discharged on No. 69; that at no time prior to the actual taking of testimony in the instant case have the appellants satisfied or attempted to satisfy it that all claims upon No. 61 had been paid; that it had been put to an expense of $500 in the prosecution of the case in the Federal court, which it asserted as a claim against the trust deed; that it was not

bound to reconvey so long as it had a *bona fide* claim against the property, however ill founded; and finally, that no deed was ever prepared by appellants and offered with a demand that it sign the same.

Were it necessary or permissible for us to rest our decision upon the two facts, whether all claims against No. 61 had been satisfied in January, 1912, that the company knew it, and that a demand for a deed had been made, we would unhesitatingly find for the appellants; but the law will not permit a substantial recovery even under the facts found by us.

The contract was completed in September, 1911, and all claims were paid in January, 1912. The legal title to the property is, and at all times has been, in appellants. All damages now asserted accrued subsequently to the time when the trust was discharged by the acts of the parties; and, under the well settled principle that one who has a cause of action shall not delay his cause that damages may accrue pending its submission to a court, a party so situate is not permitted to postpone his suit to his own profit. This rule applies with particular emphasis where a mortgagee refuses to release or satisfy a mortgage when it is paid off or discharged. With seeming purpose to avoid such consequences, and to avoid speculative damages, the legislatures in many states have passed laws providing usually for a season of grace, after demand, a right of action and a statutory penalty. Jones, Mortgages (6th ed.), § 992 *et seq.*

Some states provide for actual damages in addition to the penalty, the rule under such statutes being that the penalty is substituted in lieu of exemplary damages. *Swallow v. First State Bank*, 28 N. D. 283, 148 N. W. 630.

Our statute makes no provision for damages other than the penalty.

"If the mortgagee shall fail so to do after sixty days from the date of such request or demand, he shall forfeit and pay to the mortgagor the sum of twenty-five dollars, to be recovered in any court having competent jurisdiction, and said

court, when convinced that said mortgage has been fully satisfied, shall issue an order in writing, directing the auditor to cancel said mortgage, and the auditor shall immediately record the order and cancel the mortgage as directed by the court, upon the margin of the page upon which the mortgage is recorded, making reference thereupon to the order of the court and to the page where the order is recorded. [L. '86, p. 117, § 2]" Rem. Code, § 8799.

The recovery permitted by the statute, although so denominated, is not strictly a penalty. It is intended as a compensation to the mortgagor as well as a punishment to the mortgagee. *Engle v. Hall*, 45 Mich. 57, 7 N. W. 239.

The effect of the statute is to substitute remedies. It postpones a right of action in the interest of peace. It provides a certain recovery in all cases in lieu of the uncertainties of the common law action. Our statute does not permit a recovery of "other damages" as some do. It fixes the amount of the recovery whether the amount of the mortgage be great or small; whether actual damage be suffered at all, and although the satisfaction is withheld in good faith. *Collar v. Harrison*, 28 Mich. 518; *Shields v. Klopf*, 70 Wis. 69, 35 N. W. 284; *Renfro & Andrews v. Adams*, 62 Ala. 302; *Williams v. Hendricks*, 115 Ala. 277, 22 South. 439, 67 Am. St. 32, 41 L. R. A. 650.

By their own showing, appellants knew in January or in June, 1912, that all claims against road No. 61 had been paid. They knew of their right to institute an action sixty days after demand that the company furnish a reconveyance, which, under the circumstances, was a proper form of satisfaction and release. To permit them to recover would be to afford them a remedy for something the statute sought to avoid, that is, the enhancement of damages by the lapse of time.

There is no merit in the contention that appellants should have tendered a deed in form to be signed. The company was charged with a knowledge of the legal effect of the deed. Where a deed is made to a trustee who holds title to secure a

liability, either fixed or contingent, the trustee is held to the same rule that governs a mortgagee, and is charged with a duty to tender a satisfaction piece. 27 Cyc. 1415; *Blumenthal v. Huerter* (Ill.), 3 N. E. 425; *Pearce v. Bryant Coal Co.*, 25 Ill. App. 51.

The company contends—inasmuch as it felt impelled to try an action in the Federal court, to which we have referred, and had paid the expenses of the suit and an attorney's fee of approximately $500—that a claim against the obligor for these items, if asserted in good faith, although ill founded in law, is a sufficient excuse for its delinquency in the satisfaction of the mortgage. By the better authority, this is not so. See cases *supra*. In *Shields v. Klopf*, *supra*, it is said:

"It is entirely competent for the legislature to impose a penalty for the refusal to discharge a mortgage, regardless of the good or bad faith of the holder thereof. On the authority of *Cohn v. Neeves* [40 Wis. 393], we must look into the statute itself, which is general in its terms, to ascertain whether the legislature intended that it should be restricted in its operation to those wilfully offending against it. We find in sec. 2256 a satisfactory indication that the general language of the statute was intended to operate without restriction, and without regard to the good or bad faith of the holder of the mortgage. The statute gives to any person upon whom the demand is made to discharge a mortgage, seven days in which to determine whether he will discharge it or not. If the application of the statute is to be limited to those only who wilfully and knowingly refuse to discharge a mortgage, it is fair to presume that no days of grace would have been given. The seven days were undoubtedly given to enable the person upon whom such demand has been made, if he doubts whether the mortgage has been paid, to ascertain the facts for himself. After the expiration of that time he acts at his peril of the fact, and if the mortgage has been paid and he refuses to discharge it he is subject to the penalty of the statute."

But granting the rule contended for, the claim must at least be colorable. To be colorable, it must arise out of the

transaction as defined by the writing, or be within its contemplated range. *Malarkey v. O'Leary*, 34 Ore. 493, 56 Pac. 521. The claim now asserted arises out of an independent proceeding.

The cases relied on by appellants to sustain their theory of damage in no way bear upon the issues raised by the pleadings. They pertain to actions for breach of contract to convey, and specific performance of contracts. Damages are allowed for withholding some element of the title; whereas, in the case at bar, the deed with its declaration of trust made, in law and in equity, a mortgage. The full title, both legal and equitable, was in the appellants. *Norfor v. Busby*, 19 Wash. 450, 53 Pac. 717; *Dane v. Daniel*, 23 Wash. 379, 63 Pac. 268; *Fischer v. Woodruff*, 25 Wash. 67, 64 Pac. 923, 87 Am. St. 742; *Hitchcock v. Nixon*, 16 Wash. 281, 47 Pac. 412. The measure of damages in such cases is as defined by statute. Beyond it, the court cannot go.

But it does not follow that appellants are to be denied the relief to which they are entitled. The cross-complaint states a cause of action. Appellants have mistaken their measure of damages. The complaint would not have been demurrable for this reason. *Howard v. Seattle Nat. Bank*, 10 Wash. 280, 38 Pac. 1040, 39 Pac. 100. And we could send the case back with permission to amend. Under the statute, this is not necessary. It is provided:

"Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves." Rem. Code, § 406.

See, also, Rem. Code, § 1737; *Poledori v. Newman*, 116 Cal. 375, 48 Pac. 325; *Gunnell v. Emerson*, 80 Mo. App. 322; *Reade v. Street*, 122 N. C. 301, 30 S. E. 124; *Humphrey v. Thorn*, 63 Ind. 296.

The only issue of fact between the parties is that of demand at a time prior to March 15, 1915. The company's

main dependence rests in the legal issue raised by its assertion of good faith in delaying a satisfaction.

With the facts, the law, and the parties before us, and to the end that ultimate right between the parties may prevail, we direct that the case be remanded, with directions to enter a judgment in favor of appellants for $25 and costs.

ELLIS, C. J., MORRIS, MAIN, and WEBSTER, JJ., concur.

ON PETITION FOR REHEARING.

[Decided March 20, 1917.]

PER CURIAM.—A petition for rehearing has been filed in this case, in which it is charged, that the court overlooked its former decisions with respect to the necessity of counting on a statute if recovery is sought only under the statute and not upon other grounds; that the rule announced in this case is utterly contrary to the rule of decision announced in the several opinions of this court. *Flessher v. Carstens Packing Co.*, 81 Wash. 241, 142 Pac. 694; Id., 84 Wash. 697, 152 Pac. 17; *Hoffman v. Watkins*, 78 Wash. 118, 138 Pac. 664; *Acres v. Frederick & Nelson*, 79 Wash. 402, 140 Pac. 370; *Kanton v. Kelly*, 65 Wash. 614, 118 Pac. 890.

It is contended, further, that this court has uniformly held that the parties cannot change the theory of the action on appeal and that, *similiter*, this court erred in assuming the power to change the theory of the action for the parties.

We were not unmindful of any of the rules suggested by counsel, but the opinion in no way trenches upon them. The intervening appellants alleged that the defendant, respondent Title Guaranty & Surety Company, held a mortgage, in form a deed, upon their property; that the mortgage had been satisfied; that it refused upon demand to enter a formal satisfaction. The surety company joined issue, setting up: That appellants had not shown that the conditions of the trust deed had been performed until the trial of the action; that the surety company had a *bona fide* claim against the trust deed; that it was not bound to enter a satisfaction piece

so long as the claim was asserted in good faith; that no damages are recoverable at common law for failure to release a mortgage or lease; and that the statute provides the only penalty recoverable for failure to release or satisfy a mortgage. Upon the record, we said that, although it was not necessary to a decision, the proof was ample to sustain a finding that the conditions of the trust deed had been performed and that the mortgage had been paid. We also held against the surety company upon the legal issue, that is to say, that it could not refuse to satisfy the mortgage under the plea of good faith.

With the law and the fact decided against the surety company, the only question remaining was the measure of damage. Appellants asserted that they had been damaged in a very considerable sum. We held them to the penalty provided by statute. Appellants never had a choice of remedies. Their cause of action is the same now as it would have been had the statute fixing the penalty for a failure or refusal to satisfy a mortgage never been passed. And while it might be said, technically, that there was no cause of action and no damages recoverable at common law for the failure to satisfy a mortgage, there was such action in equity; or, to state it in another way, there was and is an action independent of all statutes. Section 8799 does not give a right of action. It assumes that a right of action existed at the time. The statute is no more and no less than a substitution of a penalty in the way of damages for the general relief allowed in equity, with interest and costs.

We shall not take time to discuss all of the cases cited. We concede them to be well sustained in principle. But they are so clearly inapplicable to a case of this kind that reference to but one or two of them will be sufficient to illustrate the strength of our position and the soundness of the opinion. In *Flessher v. Carstens Packing Co., supra*, the plaintiff had a choice of remedies. He had an action at common

law, and an action under the statute. He brought his action as a common law action. During the progress of the case, the court, in disregard of the allegations of the complaint, allowed a recovery under the terms of the statute. We held, as we have always held in such cases, that "having selected his form of action, he must abide by it," and that, "if plaintiff had desired to submit an issue upon the violation of the pure food act, he should have pleaded and proved it."

Hoffman v. Watkins, *supra*, is also consistent with our holding, if not actually supporting it. The question arose there upon testimony improperly admitted by the court. We said:

"The respondent was entitled to submit to the jury every fact within the issue, whatever its purpose was, but he was not entitled to go outside of the issue and introduce facts not issuable, either to strengthen his own case or weaken his adversary's. When litigants select the law and the courts to determine their differences, they much choose a triable issue, and having chosen that issue, no party can have a fair and impartial trial upon that issue when other irrelevant issues are persistently and extensively gone into."

Here the appellant submitted an issue of fact and an issue of law; that is, whether the mortgage had been satisfied and whether a refusal to satisfy, under an asserted claim of good faith, excused the surety company. These were the only issues. Our ruling upon them called for a reversal of the case. Having held against the surety company upon the issues both of fact and law, we could have sent the case back for no reason other than to assess the damages. The assessment of damages, when the fact is established, is a matter of law for the court. The penalty is not to be assessed by a jury, nor would a jury be permitted to assess any sum other than the penalty fixed by the statute. It is an arbitrary allowance, and may be entered by the court without testimony. We said, therefore:

"With the facts, the law, and the parties before us, and to the end that ultimate right between the parties may prevail, we direct that the case be remanded, with directions to enter a judgment in favor of appellants for $25 and costs."

There has been no departure, no abandonment of remedies, and no violation of any of the principles of law or of the decisions of this court. The error of counsel lies in the fact that they have assumed that appellants had a choice of remedies, whereas they could plead but one state of facts and were entitled to but one measure of damages. If the case were sent back without prejudice or with leave to amend, respondent would file the same complaint with a prayer for $25 penalty instead of for general damages. Under the authorities cited in our opinion, an error in alleging the measure of damage will not operate to turn a litigant out of court if he has otherwise stated a cause of action; for the measure of damages is a question of law and not of fact. To hold otherwise, would be to sacrifice substance to form and to substitute for that broad justice that should prevail in all controversies inequity and injustice.

Rehearing denied.

[No. 13567. Department One. January 13, 1917.]

THE STATE OF WASHINGTON, *Respondent*, v. T. GRANT REYNOLDS, *Appellant*.[1]

CRIMINAL LAW—LESSER DEGREES—ASSAULT IN SECOND DEGREE—INSTRUCTIONS. In a prosecution for assault by shooting another with a pistol, in which the accused admitted the shooting and claimed that it was done in self-defense, which constitutes assault in the second degree under Rem. Code, § 2414, subds. 3 and 4, relating to wilfully inflicting grievous bodily harm upon another or assaulting another with a weapon likely to produce bodily harm, it is reversible error to submit an instruction upon the subject of assault in the third degree; since accused was either guilty of assault in the second degree or not at all, even if grievous bodily harm was not inflicted.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered February 24, 1916, upon a conviction of assault in the third degree, after a trial upon an information charging assault in the second degree. Reversed.

John T. Mulligan and *S. H. Kelleran*, for appellant.

Burt J. Williams, *N. A. Pearson*, and *A. N. Corbin*, for respondent.

MAIN, J.—The defendant in this case was charged by information with the crime of assault in the second degree. The trial resulted in a verdict of assault in the third degree. From the judgment entered upon the verdict, the defendant appeals.

The statute (Rem. Code, § 2414), so far as here material, defines assault in the second degree as follows:

"Every person who, under circumstances not amounting to assault in the first degree— . . .

"(3) Shall willfully inflict grievous bodily harm upon another with or without a weapon; or

[1]Reported in 162 Pac. 358.

"(4) Shall willfully assault another with a weapon or other instrument or thing likely to produce bodily harm . . .

"Shall be guilty of assault in the second degree . . ."

The charging part of the information was as follows:

"That the said T. Grant Reynolds, in the county of Chelan, state of Washington, on the 20th day of November, 1915, then and there being, did then and there unlawfully, willfully, and feloniously inflict grievous bodily harm upon the body of one H. B. Ridgely, with a weapon, to wit, a pistol, then and there loaded with powder and bullets, which he, the said T. Grant Reynolds, then and there had and held, and did then and there unlawfully, willfully and feloniously with said pistol shoot at, towards, and into the body of said H. B. Ridgely, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Washington."

By comparing this information with the statute quoted, it will be seen that it charged assault in the second degree, both under subdivisions three and four. The evidence of the state shows that, at the time specified in the information, the appellant, with a pistol, shot at, towards, and into the body of Ridgely, inflicting a flesh wound in one thigh. The appellant, in his testimony, admits that he shot at, towards, and into the body of Ridgely, with a pistol, but claims that the shooting was done in self-defense.

The trial court, in its instructions, submitted to the jury the included offense of assault in the third degree. The only question here for determination is whether it was error to submit the question to the jury whether the appellant was guilty of assault in the third degree. In law, assault in the third degree is included within a charge of assault in the second degree, but where a defendant is charged with assault in the second degree, the question whether he is guilty of assault in the third degree should not be submitted to the jury unless the facts of the particular case are such that they will sustain a conviction of assault in the third degree. In *State v. Kruger*, 60 Wash. 542, 111 Pac. 769, the defendant

was charged with assault in the second degree. The court submitted to the jury, as an included crime, assault in the third degree, when there was no evidence supporting the crime of assault in the third degree. It was there said:

"Appellant was guilty as charged, or he was not guilty. The evidence leaves no zone of speculation or room for compromise. But it is contended that assault in the second degree includes assault in the third degree, and that the court was warranted in submitting that crime to the jury, and that the verdict was sustained. It is true that the greater includes the less, but the defendant is not guilty of either unless the testimony brings him within the definition of a crime. It was never the intent of the law to submit a possible verdict upon a so-called included crime because included in law. It must be included in fact, and by the facts of the particular case."

In *State v. McConaghy*, 84 Wash. 168, 146 Pac. 396, the defendant was charged with the crime of assault in the first degree. The trial resulted in a verdict of guilty of assault in the second degree. The trial court in that case declined to give a requested instruction submitting to the jury the question of defendant's guilt of assault in the third degree. It was there said:

"Appellant, by her own testimony, clearly admits that she shot at Matlack with intent to hit and injure him. She was questioned, and answered upon cross-examination as follows:

" 'Q. When you fired that shot at Matlack where did you aim to hit him? A. I did not have no particular place to hit him because I aimed to stop him. Q. You just fired to hit him? A. Yes, sir.'

"This, it seems to us, precludes the possibility of appellant being guilty of any other offense than that of assault in either the first or second degree. As to which of these she was guilty of, it seems plain was determinable by her intent. Assuming that she was not justified in the shooting, as the jury found, if she intended to kill Matlack she would be guilty of assault in the first degree, while if her intent was only to inflict upon him bodily injury by shooting him, a revolver being an instrument likely to produce bodily harm, she would be guilty of assault in the second degree. We see

no room for argument that any other verdict than one of these two, or a verdict of not guilty, could be rendered against appellant."

See, also, to the same effect: *State v. Harsted*, 66 Wash. 158, 119 Pac. 24; *State v. Ash*, 68 Wash. 194, 122 Pac. 995, 39 L. R. A. (N. S.) 611; *State v. Hart*, 79 Wash. 225, 140 Pac. 321; *State v. Wilson*, 83 Wash. 419, 145 Pac. 455.

Applying the doctrine of those cases to the present case, it was error to submit to the jury the question of the appellant's guilt of assault in the third degree. He was either guilty of assault in the second degree, as charged, or he was not guilty. If he shot at, towards, and into the body of the complaining witness, with a pistol, as the state's evidence shows and he admits, he is guilty of the crime as charged (unless the shooting was in self-defense), regardless of the question whether grievous bodily harm was inflicted upon Ridgely. Subdivision four of the statute above quoted makes one willfully assaulting another with a weapon likely to produce bodily harm guilty of assault in the second degree, even though grievous bodily harm may not be inflicted by such assault. In the case of *State v. Davis*, 72 Wash. 261, 130 Pac. 95, under the facts stated in the opinion, an issue upon the trial was whether grievous bodily harm had been inflicted upon the complaining witness, and it was there held that that was a question for the jury. In the case now under consideration, under the charge in the information, and under the evidence, the appellant was guilty of assault in the second degree, even though grievous bodily harm was not inflicted, unless the shooting was done in self-defense. The *Davis* case, though decided after the *Kruger*, *Harsted* and *Ash* cases, does not refer to those cases nor modify the doctrine thereof.

The judgment will be reversed, and the cause remanded for a new trial.

ELLIS, C. J., MORRIS, CHADWICK, and WEBSTER, JJ., concur.

[No. 13746. Department One. January 13, 1917.]

THE STATE OF WASHINGTON, *on the Relation of Chicago, Milwaukee & St. Paul Railway Company, Appellant*, v. PUBLIC SERVICE COMMISSION *et al., Respondents.*[1]

CARRIERS—REGULATION—RECIPROCAL DEMURRAGE—CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWERS. Since reciprocal demurrage charges for delay in failing to furnish a shipper with cars, after demand, though called a penalty, is remedial redress, administrative in its essence and incidental to administrative functions, and since the constitutional division of governmental powers into three separate departments applies only in a limited sense and does not restrict one set of officers to one department exclusively, Rem. Code, §§ 8626-59, 8626-85, empowering the public service commission to fix the time for furnishing cars and provide the penalty to be paid shippers for delays, is not unconstitutional as an unlawful delegation of legislative powers, in contravention of Const., art. 2, § 1; sections 8626-10 and 8626-11, having imposed in express terms the duty to promptly furnish cars.

SAME. Though judicial power may be conferred by the legislature upon the public service commission, that body cannot assume the legislative function and confer such power upon itself; hence the public service commission cannot, under authority to adopt rules governing reciprocal demurrage charges for failure to furnish cars, adopt a rule providing that, when any dispute or controversy arises between shipper and carrier with reference to the application of the rules for demurrage, a complaint shall be filed with the commission and a trial had subject to review in the same manner as other decisions and orders of the commission.

SAME—RECIPROCAL DEMURRAGE—REMEDIES OF SHIPPER. The statute providing no method for the collection of demurrage charges to be paid to shippers for delay in furnishing cars, the remedy of the shipper is by action at law; there being no right without a remedy.

SAME — RECIPROCAL DEMURRAGE — INTERSTATE COMMERCE — STATUTES—CONSTRUCTION. Although the terms of Rem. Code, §§ 8626-59, 8626-85, empowering the public service commission to fix the time for furnishing cars and provide the penalty to be paid shippers for delays is broad enough to apply to cars ordered for interstate commerce, the dominant purposes of the act, to be gathered from all of its provisions, to regulate only intrastate commerce must be read into all its provisions.

[1]Reported in 162 Pac. 523.

SAME. It will not be assumed that the legislature intended to adopt the construction of other state courts that such rules applied to both kinds of commerce, when to do so would make the law unconstitutional.

Appeal from a judgment of the superior court for Thurston county, D. F. Wright, J., entered June 30, 1916, in favor of the defendants, affirming an order of the public service commission, after a hearing upon a writ of review. Reversed.

F. M. Dudley and *F. M. Barkwill*, for appellant.

The Attorney General and *Scott Z. Henderson, Assistant* (*C. E. Arney, Jr.*, of counsel), for respondents.

ELLIS, C. J.—This is an appeal from a judgment entered in the superior court of Thurston county in a proceeding to review an order of the public service commission ordering that appellant railway company pay to respondent warehouse company a certain sum of money, with interest, for the failure to furnish cars in accordance with the reciprocal demurrage rules promulgated by the commission. These rules were issued and made effective as of November 5, 1912, and are numbered from one to twelve, inclusive. Prior to the transaction here involved, rules three and twelve were amended. The questions presented by this appeal relate to the validity of these rules. Rules three and twelve, as amended, are as follows:

"Rule 3. When a shipper makes written application to a railroad company for a car or cars, not exceeding ten cars in number during any one day, to be loaded with any kind of freight embraced in the tariffs of said company, stating in such application the character and approximate amount of the freight and its destination, the said railroad company shall furnish the same within six days from seven A. M. of the day following the receipt of said application; and when a shipper making application specifies a future date on which he desires to make a shipment, giving not less than six days' notice thereof, computing from seven A. M. the day following

the receipt of said application, the railroad company shall furnish said cars on the date specified in the application; Provided, in those cases where less than daily service is afforded, the six days' time above specified shall be extended to ten days; Provided further, that at the terminal points of Seattle, Tacoma and Spokane the six days' time above specified shall be reduced to three days; and, provided further, that carriers shall not be required to furnish equipment beyond the ability of the shipper to load, and Provided further, that this rule shall not be construed as requiring carriers to furnish cars for the transportation of freight destined to points upon foreign roads, such question being preserved for determination under section 24, Chapter 117, Laws of 1911 of the State of Washington.

"In case the shipper in his written application requests notification of the date of placement of the car or cars for loading, it shall be incumbent upon the railroad company to notify such shipper not less than twenty-four hours prior to the day and date upon which the car or cars will be placed stating the day and date of placement. When the application does not contain such request, it shall not be obligatory upon the company to give such notice.

"For failure to furnish cars or to give notice within the time prescribed in this rule, the railroad company shall forfeit and pay to the shipper applying for car or cars, the sum of one dollar per car per day, or fraction thereof."

"Rule 12. When any dispute or controversy arises between shipper, consignee and carriers with reference to the application or operation of any of these rules, or the collection or payment of demurrage charges thereunder, complaint must be made to the Public Service Commission, and its decision thereof shall have the same effect and be subject to review in the same manner as other decisions and orders of the commission."

In January, 1913, the warehouse company made application to the railway company, pursuant to rule 3, for cars for loading grain at Castleton, Washington, to be shipped to points on Puget Sound. The cars were not furnished within the time prescribed by the rule. In July, 1913, the warehouse company filed its complaint with the public service commission pursuant to rule 12, alleging the failure of the

railway company to furnish the cars, and praying that an order be made requiring it to pay to complainant reciprocal demurrage under rule 3 in the sum of $98. In September, 1913, in response to citation, the railway company served and filed a demurrer and an answer to the complaint. The demurrer challenged the sufficiency of the complaint and the jurisdiction of the commission on the ground that the commission is without authority, under the public service commission law, to fix any penalty to be paid to shippers applying for cars in case of failure on the part of the railway company to furnish such cars as provided by rule 3 of the reciprocal demurrage rules. We find it unnecessary further to notice the answer, since every question material to the inquiry, as we view it, is presented by the demurrer and appellant's motion to dismiss. On September 18, 1913, testimony was taken before the commission at Rosalia, Washington, a copy of which testimony is attached to the transcript before us. At the beginning of the hearing before the commission, the railway company moved to dismiss the complaint upon the ground that it violated section 3 of article 1 of the state constitution, section 1 of the Fourteenth Amendment to the Federal constitution, section 8 of article 1 of the Federal constitution, and the act of Congress regulating commerce, as amended June 29, 1906, April 13, 1908, and June 18, 1910. On June 1, 1915, the public service commission filed its findings of fact and thereon entered an order as follows:

"It is ordered, that defendant pay to complainant, H. Schlaefer Warehouse Company, the sum of $67 with interest on $14 from January 31, 1913; on $12 from February 5, 1913; on $41 from February 7, 1913, until paid."

The railway company petitioned for a writ of review, alleging, among other grounds, that the rules in question were invalid and that the commission had no jurisdiction to enter the order. The writ was issued, return thereon made, the cause was argued before the superior court of Thurston county, and judgment was entered affirming the order of the

commission on June 30, 1916. From that judgment, this appeal was taken.

I. Appellant railway company first contends that the commission had no authority to promulgate reciprocal demurrage rule 8 prescribing penalties for failure to furnish cars. This contention is based upon the claim that the sections of the statute conferring the power to make the rules are void as attempting a delegation of legislative power in contravention of section 1, article 2, of the state constitution vesting the legislative power in the senate and house of representatives. Referring to the public service commission law of this state, chapter 117, Laws of 1911, page 538, we find provisions as follows:

"Sec. 10. Every common carrier shall under reasonable rules and regulations promptly and expeditiously receive, transport and deliver all persons or property offered to or received by it for transportation. . . .

"Sec. 11. Every railroad company shall, upon reasonable notice, furnish to all persons and corporations who may apply therefor and offer property for transportation sufficient and suitable cars for the transportation of such property in carload lots. In case at any particular time a railroad company has not sufficient cars to meet all the requirements for transportation of property in carload lots, all cars available for such purpose shall be distributed among the several applicants therefor, without unjust discrimination between shippers, localities or competitive or noncompetitive points.

"Sec. 59. The commission shall have, and it is hereby given, power to provide by proper rules and regulations the time within which all railroads shall furnish, after demand therefor, all cars, equipment and facilities for the handling of freight in carload and less than carload lots, . . . the distance that freight shall be transported each day after receipt, the time within which consignors or persons ordering cars shall load the same, and the time within which consignees and persons to whom freight may be consigned shall unload and discharge the same and receive freight from the freight-rooms, and to provide the penalties to be paid to consignors and consignees for delays on the part of railroads to conform to such rules, and prescribe the penalty to be paid by con-

signors and consignees to railroads for failure to observe such rules.

"Sec. 85. The commission is hereby authorized and empowered to adopt, . . . rules governing demurrage and reciprocal demurrage, and to provide reasonable penalties to expedite the prompt movement of freight and release of cars, . . . Any public service company affected thereby, and deeming such rules and regulations, or any of them, improper, unjust, unreasonable, or contrary to law, may within twenty days from the date of service of such order upon it file objections thereto with the commission, specifying the particular grounds of such objections. The commission shall, upon receipt of such objections, fix a time and place for hearing the same, and after a full hearing may make such changes or modifications thereto, if any, as the evidence may justify. . . ." Rem. Code, §§ 8626-10, 8626-11, 8626-59, 8626-85.

It is admitted that sections 59 and 85, if themselves free from constitutional objection, sufficiently authorize the commission to promulgate rule 3 here attacked, so far as the objection now under discussion is concerned.

On the general proposition that the legislature cannot delegate the power to make purely substantive law, there can be no difference of opinion. We shall, therefore, consume no space in discussing the several authorities cited as announcing and sustaining that principle. Nor can there be any difference of opinion as to the soundness of the correlative proposition that the legislature can delegate the power to determine the facts or state of things upon which the law makes its own operation depend. *Locke's Appeal*, 72 Pa. St. 491, 13 Am. Rep. 716; *Carstens v. DeSellem*, 82 Wash. 643, 144 Pac. 934; *Cawsey v. Brickey*, 82 Wash. 653, 144 Pac. 938. The difficulty lies, not in determining the governing principle, but in its application to concrete cases. The constitutional division of all governmental powers into legislative, executive and judicial is abstract and general. Their complete separation in actual practice is impossible. The many complex relations created by modern society and business have produced many situations which can be adequately met only by vesting

in the same administrative officers or bodies powers inherently partaking to some extent of any two or all of these three functions. The intricate, complex and technical nature of the business of common carriers in their relation to the public makes this peculiarly true of legislation looking to the regulation of such business. The power of regulation of such carriers is inherent in the state. In this state, that power may be exercised either directly by the legislature or through the medium of a commission. Constitution, art. 12, § 18.

Though the legislature must itself determine a standard for regulation by which the commission must be guided, that standard need not be, and in the nature of the case cannot be, detailed and specific. It may be couched in general terms, as that the rules and orders of the commission shall be just, fair and reasonable. We have repeatedly held that the legislature may constitutionally confer on the commission judicial powers as a mediatory tribunal, since the constitutional division of governmental powers into the three separate departments applies only in a limited sense and does not restrict one set of officers to one department exclusively. *State ex rel. Oregon R. & Nav. Co. v. Railroad Commission*, 52 Wash. 17, 100 Pac. 179; *State ex rel. Railroad Commission v. Oregon R. & Nav. Co.*, 68 Wash. 160, 123 Pac. 3; *State ex rel. Railroad Commission v. Great Northern R. Co.*, 68 Wash. 257, 123 Pac. 8. It is therefore clear that, before this court can hold that any attempt of the legislature to confer on the commission a given power is void as an unconstitutional delegation of either legislative or judicial power, it must clearly appear that the power in question is purely legislative or judicial, and not merely incidental to some of the administrative powers for the exercise of which the commission was created.

Appellant's attack is particularly directed against sections 59 and 85, above quoted. It is argued that the legislature has not prescribed in these sections any duty to be performed by the carrier nor imposed any penalty for violation of any

duty, but has undertaken to leave to the commission both the imposition of the duty and the penalties for its violation, and that the delegation of this broad discretion is fatal to the act. The initial vice of this argument lies in its false premises. It assumes that these two sections are the whole of the controlling law. They are, however, only a part of one harmonious system for the regulation of common carriers provided by the whole of the public service commission law, the administrative details of which are of necessity left to the commission. Though sections 59 and 85 do not in terms impose upon railroad companies the duty to furnish cars, sections 10 and 11, above quoted, do impose that duty in express terms. The statute itself thus disposes of appellant's first criticism. It only remains to consider whether the delegation of the power to prescribe the so-called penalties to be paid to persons ordering cars by the railroads for their failure to furnish them is unconstitutional as an attempt to delegate the legislative power. Though the statute uses the word "penalty," it is clear that the thing which it actually authorizes the commission to fix is not a penalty, but compensation in the nature of liquidated damages for the failure to furnish cars. What that compensation should be and what free time should be allowed to the railroad company for the furnishing of cars, are things so essentially depending upon varying facts and circumstances as to be, in the language of *Locke's Appeal*, "the subject of inquiry and determination outside of the halls of legislation," and hence peculiarly suitable to be delegated to the commission as incident to its purely administrative powers. In this respect, there is no distinction between prescribing reasonable compensation for delay in returning cars or delay in furnishing cars and in fixing reasonable rates. In this respect, also, there is the same distinction between prescribing such compensation and fixing a penalty in its nature purely punitive, as there is between the fixing of reasonable rates and the prescribing of such penalties. Both the fixing of reasonable rates and the fixing of reasonable demurrage for

the failure to furnish cars, in their nature involve the determination of the question of reasonable compensation.

Touching the question of the delegation of legislative powers, the almost infinite variety of detail and circumstance, and of the laws intended to meet them, have led to an almost equal variety of judicial decision and utterance which, taken in the abstract, cannot be harmonized. A review in detail of the vast array of authorities cited is manifestly impracticable, and any notice not in detail would be wholly useless. We shall, therefore, confine ourselves to an analysis of those cases which present a near parallel to that before us.

In *Southern R. Co. v. Melton*, 133 Ga. 277, 65 S. E. 665, the supreme court of Georgia was confronted with the exact question here involved. The second section of the Georgia railroad commission act of 1905, which is quoted in the opinion, so far as the question under discussion is concerned, did not materially differ from § 59 of our statute above quoted. Rule 9 of the Georgia commission, made pursuant to that section, is also quoted in the opinion, and was not materially different from rule 3 of our public service commission above quoted, save that it contained no exception of cars destined for use on foreign roads. It was held, in substance, that, though the statute designated the reciprocal demurrage as a penalty to be fixed by the commission, it was not in fact penal in its nature, but remedial; that, while the legislature could not delegate to the commission the power to make a penal law, it could delegate the power to fix the time within which cars should be furnished after demand, and a reasonable amount to be recovered by the shipper for the failure to so furnish cars, and that this was no less an administrative detail than the fixing of reasonable rates. The court said:

"The legislature itself enacted the law and outlined the duty and power of the commission on this subject, and indicated the matter to be dealt with by the commission, the pur-

pose of dealing with it, and the authority of the commission in reference to carrying into effect that purpose. It not only authorized but required the fixing by 'reasonable rules' of an amount to be paid per day for failure to furnish cars. It is difficult to see why the reasoning on which the authority of the legislature has been upheld to establish a commission and authorize it to carry into effect the legislative purpose, and, to that end, to make rules and regulations and fix rates which should be 'reasonable,' is not applicable to this act. If the legislature itself could provide in general terms for the making of reasonable rates, charges, and regulations, but leave the details to be carried into effect by the commission, for the reasons stated in the case of *Georgia Railroad v. Smith, supra*, and if the legislature also had authority to require the prompt furnishing of cars by a railroad company, and to name a reasonable amount recoverable by the shipper for a default on the part of the carrier in that respect, why could they not provide for this in general terms, as in the other case, and leave it to the commission to investigate and declare by rule what would be a reasonable time and amount?"

In *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 South. 969, 32 L. R. A. (N. S.) 639, was involved rule eight of the Florida railroad commission, which, so far as here concerned, was substantially the same as rule 3 of our commission. The Florida statute, among other things, provided that the commission should have power:

"To regulate the charges for storage, wharfage and demurrage under such just and reasonable conditions as said commissioners may prescribe . . . and to direct and control all other matters pertaining to railroads that shall be for the good of the public. Said commissioners shall have full power and authority to require any railroad, railroad company or common carrier to properly operate its railroad or transportation line and to furnish all the necessary facilities for the convenient and prompt handling, transportation and delivery of all freights offered along its line for transportation, and shall provide and prescribe all such rules and regulations as may be necessary to secure such operation and the furnishing of such facilities and the prompt handling, transportation and delivery of all freights offered."

It will be noted that this statute is much less explicit than ours. While the case went off on another point, the court exhaustively discussed the question here involved, and held, at page 649:

"The charge allowed a carrier for cars unduly delayed by a shipper is technically called demurrage, is remedial in its nature, and is clearly not a penalty. So, likewise, the reciprocal charge allowed a shipper for freight unduly delayed on loaded cars by the carrier is in its nature remedial and is not a penalty. The right of a shipper to have his goods promptly transported by a common carrier is a valuable right. See *New Mexico ex rel. McLean v. Denver & Rio Grande Railroad Company*, 203 U. S. 38; Moore on Carriers, 246. The shipper has as much right to relief from a delay in transporting his freight when it is properly offered as the carrier has to relief from a delay of a car unduly held for loading. There may be no injury or depreciation in the value of the car or the freight by a delay, but the right to promptness and convenience exists and may be enforced, and the public has an interest in the prompt movement of cars needed for other shipments. The purpose designed to be accomplished in allowing this reciprocal charge, or in imposing this reciprocal liability, is to afford the carrier and the shipper a limited cumulative remedy to prevent the delaying of cars and of freight, and to incidentally serve the public welfare by stimulating and facilitating the transportation of freight."

Counsel for appellant here say that this is mere dictum, but as pointed out by Judge Lumpkin in *Southern R. Co. v. Melton*, *supra*, it cannot soundly be so regarded; but even if it were, we agree with the Georgia court in the view that it expresses the true distinction between a penal sanction of the law, which can only be imposed directly by the legislature itself, and remedial redress administrative in its essence, the power to provide for which may be delegated to the administrative commission.

In *Keystone Lumber Yard v. Yazoo & M. V. R. Co.*, 97 Miss. 433, 53 South. 8, 10, the supreme court of Mississippi, adopting the reasoning and much of the language of the Florida court in *State v. Atlantic Coast Line R. Co.*, *supra*,

distinctly held that the fixing of a charge for delay, such as that here involved, is remedial and in the nature of liquidated damages, rather than a penalty in the nature of a fine.

Appellant seeks to distinguish the first of these cases from that before us by the fact that the Georgia statute apparently made the exercise of the power by the commission mandatory, while our statute confers the power to make the rule but does not expressly make its exercise mandatory. We think, however, that the conferring of the power, when construed in the light of the entire purpose of our railroad commission law, impliedly imposes the duty to exercise it. But be that as it may, the mere fact that a power is discretionary does not change its nature. Not every discretionary power is essentially legislative. If, as we have seen, the power conferred by the statute here in question is a power incidental to the administrative functions of the commission, it was validly conferred, and the circumstance that its exercise is discretionary with the commission does not alter that fact. Both on reason and authority, we are constrained to hold that neither the statute here in question nor rule 3 made thereunder is void as an unconstitutional delegation of the legislative function.

II. Appellant's second contention is that the commission had no jurisdiction to entertain respondent's complaint or to make the order awarding reparation. This contention is based upon the claim that the public service commission law, chapter 117, Laws 1911, p. 538 (Rem. Code, § 8626-1 *et seq.*), does not provide for any such hearing, and that rule 12 of the commission providing for such hearing is therefore void as an unconstitutional assumption by the commission of legislative power granting to itself judicial power. If the sole objection were that the making of this rule was unauthorized by the public service commission law, appellant would be precluded from raising it by its failure to contest the rule within twenty days after its promulgation, as provided in § 8626-85 of that law. But the objection goes

deeper. It involves a constitutional question which, if well taken, makes the rule absolutely void, and hence contestable at any time and in any proceeding in which it is involved. Undoubtedly, had the public service commission law itself expressly conferred upon the commission authority to have such a hearing as that provided for in rule 12, and limited the effect of any order made on such hearing to a mere *prima facie* establishment of the facts therein determined, this would not have been an unconstitutional delegation of judicial power. The supreme court of the United States has distinctly so held as to authority of that character granted to the interstate commerce commission in the act of Congress to regulate commerce and the acts amendatory thereof. *Meeker v. Lehigh Valley R. Co.*, 236 U. S. 412, Ann. Cas. 1916B 691; *Southern R. Co. v. Atlanta Sand & Supply Co.*, 135 Ga. 35, 68 S. E. 807. But the *conferring* of such authority is clearly the making of substantive law. It is legislation, pure and simple. Though we have held that judicial power may be *conferred by the legislature* upon the commission as incidental to its administrative functions, pursuant to § 18, art. 12 of the state constitution (*State ex rel. Oregon R. & Nav. Co. v. Railroad Commission*, 52 Wash. 17, 100 Pac. 179), neither this court, nor any other court so far as we are advised, has ever held that an administrative body can *assume* the legislative function and confer upon itself the power to make a law giving to itself judicial functions even as incidental to its administrative powers. Herein lies the distinction between the authority of the commission in relation to the subject-matters of rule 3 and rule 12. The authority to make rules for demurrage and reciprocal demurrage and to provide so-called penalties in the nature of compensation for their violation, as exercised in rule 3, was expressly conferred. The authority to have a hearing on any violation of that rule and award such compensation, as assumed in rule 12, was not conferred. We therefore hold that rule 12 is void as an unconstitutional assumption by an adminis-

trative body of both legislative and judicial power. The order made pursuant to that rule is *brutum fulmen*. It can have no binding force, either *prima facie* or otherwise.

But it does not follow that respondent warehouse company was without remedy. The public service commission law made it the duty of the railroad company to furnish cars. It conferred upon the commission the authority to prescribe the time within which such cars should be furnished and the compensation to be paid to the shipper by the railroad company for its failure to perform that duty. Rule 3 is, therefore, a valid rule. Its violation created a right in the shipper to recover the prescribed compensation from the railroad company. It is the boast of our law that there can be no right without a corresponding remedy. When the right is once created, the common law furnishes the remedy.

The case of *Southern R. Co. v. Atlanta Sand & Supply Co., supra*, involved a suit by one claiming to have been damaged by the failure of a railroad company to furnish cars under rule 9 of the Georgia railroad commission which, so far as this question is concerned, was substantially the same as rule 3 here involved. In addition to section 2 of the Georgia statute authorizing the making of rule 9, the statute contained another section, 3, giving to the railroad a hearing before the commission on any complaint that the rules had been violated. After the suit had been commenced, the shipper made complaint to the commission under the latter section of the statute. The commission issued citation to the railroad company to show cause why the rule should not be enforced. The railroad company answered by letter, stating that all orders for cars had been promptly filled and no discrimination practiced, and that, inasmuch as a suit had been commenced, it was not worth while to answer further. The commission thereupon treated this letter as a waiver of further hearing, and entered an order "that sufficient cause had not been shown to relieve said company of the penalty claimed." The supreme court of Georgia held that, since

the statute did not prescribe how the penalty fixed by the commission rule 9 should be recovered, there was a necessary implication that it could only be recovered by a resort to the courts, and that in such suit the railroad company might plead and prove any sufficient excusing causes for noncompliance. The court said:

"The act of this state of August 23, 1905 (Acts 1905, p. 120), does not in terms provide how the shipper is to obtain payment of the 'forfeitures or penalties' prescribed in the second section thereof. This being so, impliedly he must resort to the courts and bring suit therefor."

and again:

"It could not have been the legislative purpose to provide for the obtaining by a shipper of a conclusive judgment against a railroad company, before the commission. That body could not, like a court, render conclusive money judgments between parties. The shipper would have to go to the court finally and seek to recover by suit. The section did not in terms provide for any notice to the shipper or for any hearing on his part. It declared that 'if sufficient cause is shown,' the company 'shall be relieved from any further liability under this act;' but it said nothing as to what would happen if sufficient cause were not shown. It would seem that the shipper could then go ahead and sue."

So far as the question here involved is concerned, the case quoted and that here are identical. Respondent warehouse company must be remitted to its action at law for a recovery. What period of limitation would apply to such an action, and whether the things set up in the answer of the railroad company in the proceeding now before us would state a defense to such an action, we shall not prejudge.

III. Appellant's third contention is that reciprocal demurrage rule 3 is void as an interference with and regulation of interstate commerce. Though the cars here involved were ordered for intrastate use, we cannot avoid a consideration of this question. The rule is indivisible in its provisions. If it must be held to apply to both kinds of commerce and is

void as to one kind, it is void *in toto*. That it is beyond the power of a state, whether by rule or statute, to regulate the delivery of cars for interstate shipments, is now well settled. Reciprocal demurrage rules of a state, therefore, cannot apply to such cars. *Chicago, R. I. & P. R. Co. v. Hardwick Farmers Elevator Co.*, 226 U. S. 426, 46 L. R. A. (N. S.) 203; *Yazoo & Mississippi Valley R. Co. v. Greenwood Grocery Co.*, 227 U. S. 1; *St. Louis, I. M. & S. R. Co. v. Edwards*, 227 U. S. 265; *Oregon R. & Nav. Co. v. Martin*, 229 U. S. 606. The state demurrage laws involved in each of these cases had been construed by the courts of the states, respectively, as applying alike to interstate and intrastate commerce. Neither our demurrage rule 3 nor the statute under which it was promulgated has ever been so construed by this court. But appellant argues that the language of the rule is broad enough to apply to cars ordered for both kinds of commerce, and that therefore the court cannot construe either it or the law as not intended so to apply. Such an argument, if applied to each of the various provisions of our railroad commission law, would defeat many of them as attempts to invade the power of Congress to regulate interstate commerce. Many of these provisions, standing alone, are couched in language broad enough to cover both kinds of commerce. But inasmuch as the dominant purpose of the act, to be gathered from all of its provisions, was merely to regulate intrastate commerce, it seems to us but reasonable to hold that this dominant purpose should be read into all of its provisions. *Ann Arbor R. Co. v. Michigan Railroad Commission*, 163 Mich. 49, 127 N. W. 746, Ann. Cas. 1915A 564; *Pittsburg, C. C. & St. L. R. Co. v. Railroad Commission*, 171 Ind. 189, 86 N. E. 328; *Michigan Railroad Commission v. Michigan Cent. R. Co.*, 168 Mich. 230, 132 N. W. 1068; *Michigan Cent. R. Co. v. Michigan Railroad Commission*, 236 U. S. 615.

Appellant further argues that, because the courts of last resort of certain of the states, at the time the reciprocal demurrage rules of this state were adopted, had held that it was within the power of the states to make such rules applicable to interstate commerce as well as to intrastate commerce, therefore it must be assumed that the legislature and the commission of this state intended our rules to apply to both kinds of commerce. Respondent answers that such an intention cannot be so inferred, because, at the time of the adoption of these rules, the supreme court of the United States in *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, and in *St. Louis Southwestern R. Co. v. Arkansas*, 217 U. S. 136, 29 L. R. A. (N. S.) 802, had held the demurrage rules of Texas and Arkansas invalid as applied to interstate commerce. Appellant retorts that these decisions do not hold that no reciprocal demurrage rules of a state could validly apply to interstate commerce, but only that the ones there in question could not so apply because they imposed excessive burdens on interstate carriers and made no allowance for reasonable excuses on the carrier's part for failure to comply with the rules. It is true that neither the decisions cited, nor any other decision of the United States supreme court up to the time of the making of rule 3 by our commission, had expressly reprobated all state demurrage rules as applied to interstate commerce. But the two cases cited had certainly left the power of the states in the premises in a most doubtful condition, and, we think, so much so that no persuasive force can be given to the argument that, because of prior decisions of other state courts sustaining such rules as applied to both kinds of commerce, our legislature and commission must have intended the rules here involved so to apply. The argument, so far as it is entitled to any force, seems to us to look the other way, since we cannot assume that the legislature of this state intended to adopt even doubtfully sound rules.

So far as we are advised, the public service commission has never construed these rules as applicable to interstate commerce, nor attempted to enforce them as to cars ordered for use in such commerce. This court has never construed them as intended to be so applied. To do so now would seem to be a wanton exercise of the power to so construe a law as to make it certainly unconstitutional. Our duty, as we see it, lies the other way.

For the reasons stated in our discussion of the second question involved in this appeal, the order complained of is void. For that reason alone, the judgment is reversed, and the cause is remanded with direction to dismiss the proceeding.

MORRIS, MAIN, PARKER, and CHADWICK, JJ., concur.

[No. 13657. *En Banc.* January 13, 1917.]

STANDARD OIL COMPANY, *Respondent*, v. H. T. GRAVES, *as State Commissioner of Agriculture, Appellant.*[1]

CUSTOMS DUTIES—CONSTITUTIONAL RESTRICTIONS—INTERSTATE COMMERCE—OIL INSPECTION FEES. Rem. Code, § 6051 *et seq.*, exacting a remunerative inspection fee for the inspection of oils coming from another state into this state for sale, does not violate U. S. Const., art. 1, § 10, cl. 2, providing that no state shall, without the consent of Congress, "lay any imposts or duties on imports or exports, except what may be absolutely necessary for execution of its inspection laws;" since this does not refer to articles carried from one state to another, but only to foreign importations.

SAME. The act does not violate U. S. Const., art. 1, § 9, cl. 5, providing that "no tax or duty shall be laid on articles exported from any state," as this relates only to exportations to foreign countries.

COURTS—RULE OF DECISION—FEDERAL QUESTION. The decisions of the United States supreme court are controlling on the question whether oil sought to be subjected to an inspection tax was then an article of interstate commerce.

[1]Reported in 162 Pac. 558.

COMMERCE—INTERSTATE COMMERCE—OIL INSPECTION LAW. Where oil is brought into this state for the purpose of sale, Rem. Code, § 6052, providing for inspection and levying a remunerative inspection fee on all oils and gasoline "before being sold or offered for sale," does not violate U. S. Const., art. 1, § 8, cl. 3, reserving to Congress the power to regulate interstate commerce.

CONSTITUTIONAL LAW—PRIVILEGES AND IMMUNITIES—DUE PROCESS OF LAW. Rem. Code, § 6051 *et seq.*, levying a remunerative inspection tax on all oils and gasoline "before being sold or offered for sale" does not impinge the fourteenth amendment to the Federal Constitution prohibting the abridgement of privileges and immunities of citizens or the taking of property without due process of law or the state Const., art. 1, § 3, providing for due process of law.

LICENSES—PRIVILEGE TAX—UNIFORMITY—TAXATION. Rem. Code, § 6051 *et seq.*, levying a remunerative inspection tax on all oils and gasoline "before being sold or offered for sale" does not conflict with Const., art. 7, § 2, providing for uniformity and equality of taxation, and § 5 relating to the method of levying taxes; since these provisions refer to taxes upon property and not to taxes upon trades or to privilege or excise taxes.

SAME. The exaction of a remunerative inspection fee for the inspection of all oils and gasoline "before being sold or offered for sale" is not a tax on property, since it is to be paid only upon the contingency that the oil is sold or offered for sale.

CONSTITUTIONAL LAW—POWER OF COURTS. The courts cannot look to the purpose or motive prompting legislative action to restrain the enforcement of a law that is not unconstitutional, even though it may be unjust or unreasonable.

Appeal from a judgment of the superior court for Thurston county, D. F. Wright, J., entered May 17, 1916, in favor of the plaintiff, upon overruling a demurrer to the complaint, in an action for an injunction. Reversed.

The Attorney General and *L. L. Thompson, Assistant*, for appellant.

Ballinger, Battle, Hulbert & Shorts and *Pillsbury, Madison & Sutro*, for respondent.

MAIN, J.—The purpose of this action was to enjoin the enforcement of the oil inspection act passed by the legislature of this state. To the amended complaint, a demurrer was

interposed and overruled by the trial court. The defendant refused to plead further and elected to stand upon his demurrer. Thereupon a judgment was entered granting a permanent injunction restraining the defendant from enforcing the law. From this judgment, the defendant appeals. The facts stated in the amended complaint, sufficient to an understanding of the questions here presented, may be summarized as follows:

The respondent is a corporation, organized and existing under the laws of the state of California. The appellant is the commissioner of agriculture of the state of Washington, and, under chapter 60, the Laws of 1913, p. 196 (Rem. Code, § 3000-1 *et seq.*), it is made his duty to enforce the state oil inspection law. The respondent is engaged in the state of California in the business of producing and buying crude petroleum oil, and of manufacturing and refining the same, and of shipping products of such manufacture from its refineries in the state of California into the state of Washington, where the same "are sold by this plaintiff in large quantities for use and consumption in the state of Washington for illuminating, manufacturing, domestic and power purposes." The respondent maintains in the state of Washington wharves, docks, tanks, warehouses, and other equipment necessary for the selling and distributing of oils which are shipped into this state for use and consumption. Under the provisions of chapter 192 of the Laws of 1907, p. 413 (Rem. Code, § 6051 *et seq.*), the respondent has, for a number of years, paid the inspection fees provided for in that act, and the amount so paid is largely in excess of the reasonably necessary cost of inspecting and labeling the oils and administering the law. From June 30, 1905, to December 31, 1914, the amount of the fees collected which were in excess of the cost of inspecting and labeling the oil and the administering of the law was $255,672.93. Since the act of 1907 was passed, the excess fees over what was reasonably necessary for the inspection, labeling, and adminis-

tering the law has gradually increased. During the year 1914, the gross receipts from the enforcement of this law were $79,339.66. The disbursements under the law were $8,553.75, leaving a net revenue for that year of $70,785.91, which was paid into the treasury as required by the statute. It is alleged that the appellant, unless restrained, will continue to enforce the provisions of the law, and will refuse to inspect the illuminating oil, gasoline, distillate, and other volatile products of petroleum manufactured by the respondent in the state of California and shipped by it from that state into the state of Washington for sale, for use, and consumption therein, unless the respondent pays the fees required by the act. It is claimed that the law offends against certain provisions of the constitution of the United States, as well as the constitution of this state. These constitutional provisions will be hereinafter referred to and considered.

The inspection law referred to in the complaint was first passed during the legislative session for the year 1905 [Laws 1905, p. 310]. That act was amended in 1907, and will be found in chapter 192 of the Laws of 1907, p. 413 (Rem. Code, § 6051 *et seq.*). Section 3 (Id., § 6052) of this act provides that all gasoline, benzine, distillate or other volatile product of petroleum intended for use or consumption in this state for illuminating, manufacturing, domestic or power purposes, "before being sold or offered for sale," shall be inspected by the state oil inspector or his deputies. When the inspection is made, a certificate is to be issued, and the barrel or receptacle which contains the oil must be labeled or branded. Section 4 (Id., § 6053) of the act contains a schedule of the fees which shall be paid for the inspection. Section 6 (Id., § 6055) provides that if any person or persons, whether manufacturer, vender or dealer, or as agent or representative of any manufacturer, vender or dealer, "shall sell or attempt to sell" to any person, firm or corporation in this state, any illuminating oil, gasoline, benzine, distillate or any volatile product of petroleum, intended for

use or consumption within this state, that has not been inspected and branded according to the provisions of the act, "shall be guilty of a misdemeanor." By the Laws of 1913, chapter 60, p. 196 (Rem. Code, § 3000-1 *et seq.*), it was made the duty of the commissioner of agriculture to exercise all the powers and perform all the duties which, by the law of 1907, were vested in, and required to be performed by, the state oil inspector.

The first question is whether the oil inspection law offends against article 1, section 10, clause 2, of the Federal constitution, which provides that no state shall, without the consent of Congress, "lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; . . ." This constitutional provision, as construed by the Federal supreme court, does not refer to articles carried from one state into another, but only to articles imported from foreign countries into the United States. *Woodruff v. Parham*, 8 Wall. 123; *Brown v. Houston*, 114 U. S. 622; *Patapsco Guano Co. v. North Carolina Board of Agriculture*, 171 U. S. 345.

Under the facts stated in the amended complaint, the oil was not imported from a foreign country into the United States, but was carried from one state into another, and the constitutional provision referred to has no application.

The second question is whether article 1, section 9, clause 5, of the Federal constitution, which provides that "no tax or duty shall be laid on articles exported from any state," can be invoked by the respondent. This mandate relates only to exportations to foreign countries, and is designed to give immunity from taxation to property that is in the actual course of such exportation. *Dooley v. United States*, 183 U. S. 151; *United States v. Hvoslef*, 237 U. S. 1, Ann. Cas. 1916A 286.

The third question is whether the statute required the inspection to be made during the time that the oil was an article in interstate commerce. Article 1, section 8, clause 3, of the

Federal constitution provides that the Congress of the United States shall have power "to regulate commerce with foreign nations and among the several states and with the Indian tribes." The determination of this question involves a consideration of the question whether the oil owned by the respondent in this state, when it was sought to be subjected to the inspection tax, was then an article in interstate commerce. In the solution of this question, the decisions of the United States supreme court are controlling. In *Bacon v. People of Illinois*, 227 U. S. 504, grain had been shipped by the original owners, who were residents of the southern and western states, under contracts for its transportation to New York, Philadelphia, and other eastern cities. These contracts reserved to the owners the right to remove the grain from the cars at Chicago "for the mere temporary purposes of inspecting, weighing, cleaning, clipping, drying, sacking, grading or mixing, or changing the ownership, consignee or destination" thereof. While the grain was in transit, it was purchased by Bacon, the plaintiff in error, who succeeded to the rights of the vendors, under the contracts of shipment. At the points of destination, Bacon was represented by agents, through whom he disposed of the grain and other commodities on the eastern markets. The grain there in question was purchased by him solely for the purpose of being sold in this way, and with the intention to forward it according to the shipping contracts. It was not his intention to dispose of it in Illinois. Upon the arrival of the grain in Chicago, Bacon availed himself of the privilege reserved, and removed it from the cars to his private elevator. This removal was for the sole purpose of inspecting, weighing, grading, mixing, etc., and not for the purpose of changing its ownership, consignee or destination. All grain remained in the elevator only for such time as was reasonably necessary for the purposes mentioned, and immediately after these purposes had been accomplished, it was turned over to the railroad companies, and forwarded by them to the eastern

cities, in accordance with the original contract. No part of the grain was sold or consumed in Illinois. While it was in Bacon's elevator in Chicago, it was, by the board of assessors of Cook county, Illinois, assessed, and a tax levied thereon. Upon these facts, it was held that the grain, when the tax was assessed, was not the subject of interstate commerce, because the property was in the state of Illinois for purposes deemed by the owner to be beneficial to himself, and was not in actual transportation. It was there said:

"But neither the fact that the grain had come from outside the state nor the intention of the owner to send it to another state and there to dispose of it can be deemed controlling when the taxing power of the state of Illinois is concerned. The property was held by the plaintiff in error in Chicago for his own purposes and with full power of disposition. It was not being actually transported and it was not held by carriers for transportation. The plaintiff in error had withdrawn it from the carriers. The purpose of the withdrawal did not alter the fact that it had ceased to be transported and had been placed in his hands. He had the privilege of continuing the transportation under the shipping contracts, but of this he might avail himself or not as he chose. He might sell the grain in Illinois or forward it as he saw fit. It was in his possession with the control of absolute ownership. He intended to forward the grain after it had been inspected, graded, etc., but this intention, while the grain remained in his keeping and before it had been actually committed to the carriers for transportation, did not make it immune from local taxation. He had established a local facility in Chicago for his own benefit and while, through its employment, the grain was there at rest, there was no reason why it should not be included with his other property within the state in an assessment for taxation which was made in the usual way without discrimination. *Woodruff v. Parham, supra; Brown v. Houston, supra; Coe v. Errol, supra; Pittsburgh & Southern Coal Co. v. Bates*, 156 U. S. 577; *Diamond Match Co. v. Ontonagon, supra; American Steel & Wire Co. v. Speed, supra; General Oil Co. v. Crain, supra.*

"The question, it should be observed, is not with respect to the extent of the power of Congress to regulate inter-

state commerce, but whether a particular exercise of state power in view of its nature and operation must be deemed to be in conflict with this paramount authority. *American Steel & Wire Co. v. Speed, supra*, pp. 521, 522. Thus, goods within the state may be made the subject of a nondiscriminatory tax though brought from another state and held by the consignee for sale in the original packages. *Woodruff v. Parham, supra.* In *Brown v. Houston, supra*, the coal on which the local tax was sustained had not been unloaded, but was lying in the boats in which it had been brought into the state and from which it was offered for sale. In *Pittsburgh & Southern Coal Co. v. Bates, supra*, coal had been shipped from Pittsburgh to Baton Rouge in barges which, to accommodate the owner's business, had been moored about nine miles above the point of destination. The coal while remaining on the barges under these conditions was held subject to taxation. In *General Oil Co. v. Crain, supra*, the oil which had been brought from Pennsylvania to Memphis, a distributing point, was held in tanks, one of which was kept for oil for which orders had been received from Arkansas, Louisiana and Mississippi prior to the shipment from Pennsylvania, and which had been shipped especially to fill such orders. The tank was marked 'Oil Already Sold in Arkansas, Louisiana and Mississippi.' The local tax upon this oil, which remained in Tennessee only long enough (a few days) to be properly distributed according to the orders, was sustained.

"In the present case the property was held within the state for purposes deemed by the owner to be beneficial; it was not in actual transportation; and there was nothing inconsistent with the Federal authority in compelling the plaintiff in error to bear with respect to it, in common with other property in the state, his share of the expenses of the local government."

We have quoted thus copiously from that opinion, because it seems to fully and clearly set forth the views of the court, and reviews the previous holdings. In *General Oil Co. v. Crain*, 209 U. S. 211, it was sought to subject certain oils in the tanks or containers to the payment of the oil inspection tax of that state. It was there contended that the oil in the tanks mentioned was in transit from the place of

manufacture, in Pennsylvania, to the place of sale, in Arkansas, and other southwestern states, and that the delay at Memphis was merely for the purpose of separation, distribution and reshipment, and was for no longer time than required by the nature of the business and the exigencies of transportation. The oil at Memphis, Tennessee, was placed in two tanks, when it was removed from the tank cars in which it had been shipped from Pennsylvania. In one tank was kept the oil for which orders had been received from the states above mentioned before its shipment from the manufacturing plants, and which had been shipped to fill such orders. This oil was unloaded at Memphis only for the purpose of distribution into smaller vessels to meet the requirements of such orders, and it was kept separate from oils for sale in Tennessee. It remained in Tennessee only long enough (a few days) to be properly distributed according to the orders therefor. In another tank, or vessel, was the oil to be sold in the states mentioned, but for which no orders, at the time of shipment from the manufacturing plants, had been received. The oil in this tank was marked "Oil to be sold in Arkansas, Louisiana and Mississippi," and was kept separate and apart from all other oil until required to supply orders to plaintiff's customers in those states. The legislature of the state of Tennessee had previously passed an oil inspection law which is strikingly similar to the law of this state. The question there was whether the oils in the two tanks mentioned were subject to the inspection tax provided by the Tennessee law. It was there claimed that the fees were unreasonable and exorbitant for the services performed, and very much greater than necessary to provide for inspection, and that, after payment of the salaries and other expenses incident to inspection, a surplus of many thousand dollars went annually into the treasury. It was there held that the oil in both tanks had lost its character as an article in interstate commerce, and was subject to the power of the state to tax, because the oil had been brought

to a state of rest in the state of Tennessee, and was entitled to the protection of the laws of that state, and was placed in the tanks for the business purposes of the owner. It was there said:

"The company was doing business in the state, and its property was receiving the protection of the state. Its oil was not in movement through the state. It had reached the destination of its first shipment, and it was held there, not in necessary delay or accommodation to the means of transportation, as in *State etc. v. Engle, supra*, but for the business purposes and profit of the company. It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the state beyond a mere halting in its transportation. It required storage there—the maintenance of the means of storage, of putting it in and taking it from storage. The bill takes pains to allege this. 'Complainant shows that it is impossible, in the coal oil business, such as complainant carries on, to fill separately each of these small orders directly from the railroad tank cars, because of the great delay and expense in the way of freight charges incident to such a plan, and for the further reason that an extensive plant and apparatus is necessary, in order to properly and conveniently unload and receive the oil from said tank cars, and it would be impracticable, if not impossible, to have such apparatus and machinery at every point to which complainant ships said oil.'

"This certainly describes a business—describes a purpose for which the oil is taken from transportation, brought to rest in the state and for which the protection of the state is necessary, a purpose outside of the mere transportation of the oil. The case, therefore, comes under the principle announced in *American Steel & Wire Co. v. Speed*, 192 U. S. 500.

"We have considered this case so far in view of the cases which involve the power of taxation. It may be that such power is more limited than the power to enact inspection laws. *Patapsco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 356. The difference, if any exists, it is not necessary to observe. The cases based on the taxing power show the contentions of plaintiff in error are without merit; in

other words, show that its oil was not property in interstate commerce.

"As our conclusion is that no constitutional right of the oil company was violated by the enforcement of the law of 1899, it follows that no error prejudicial to the company was committed by the supreme court of Tennessee, and, for the reasons stated, its judgment is affirmed."

According to the facts stated in the amended complaint in the present case, the oil was brought into this state for the purpose of sale. It is not alleged in the complaint that the inspection was sought to be made while it was still in transit and before it came to a state of rest within the state. The inspection law, as above indicated, only requires that the oil be inspected and tested before it is sold or offered for sale. If the grain in the *Bacon* case, while it was in the elevator in Chicago, was no longer in interstate commerce, and the oil in the *General Oil Co.* case had lost its character of interstate commerce while in the tanks at Memphis, Tennessee, it would seem to follow that a law which requires that the oil be inspected before it is "sold or offered for sale" does not interfere with interstate commerce. In *Spaulding v. Adams County*, 79 Wash. 193, 140 Pac. 367, four carloads of buggies had been shipped from Grinnell, Iowa, to Ritzville, this state. The buggies were shipped in a dismantled condition, and were unloaded from the cars in which they arrived, and carried to a warehouse rented by the appellants, where they were reassembled and kept until sold. On the arrival of the buggies in the city of Ritzville, the corporate authorities of Adams county caused them to be valued for assessment purposes, and caused a tax to be levied thereon. One of the questions in the case was whether the buggies had lost their character of interstate commerce at the time the assessment was made. The case was here upon the findings, and there was a controversy over the construction of certain words used therein. Spaulding contended that, according to the findings, the assessment was made

prior to the time when the property was unloaded from the cars in which it had been carried into the state. The county contended that, according to its construction of the findings of the trial court, the assessment was not made until after the buggies had been unloaded from the cars. Speaking of the effect, if the findings were given the construction contended for by Spaulding, the court held that, even under that construction, the buggies had lost their character of interstate commerce. It was said:

"But we think the rule would not be different were the appellant's construction of the findings the correct construction. The property had reached its destination. It had come to its place of rest for final disposal and use, and was to remain there until finally disposed of by the owner. As such, we think it constituted a part of the mass of the general property of the county, even while on the cars, and was thus subject to taxation under the provision of the statute quoted, since it was the intention of the owners to take it to a place of business to be temporarily occupied for its sale."

In the respondent's brief, the case of *Foote & Co. v. Maryland*, 232 U. S. 494, is much relied upon to support the judgment of the trial court, and the suggestion is made that that case modifies or overrules the *General Oil Co.* case, *supra*. In that case, the plaintiffs, D. E. Foote & Company, Incorporated, were engaged in the business of packing oysters at Baltimore, Maryland. The oysters were taken from the waters of Maryland, Virginia, and New Jersey. The legislature of the state of Maryland had passed a law for the inspection of oysters, and it was made the duty of the inspectors to inspect all oysters in the district to which they were respectively assigned. It was there held that, as to the oysters shipped from Virginia and New Jersey, the inspection law placed a burden upon interstate commerce. The question in that case was whether articles in interstate commerce could be required to pay an inspection fee which was greatly in excess of the inspection cost. It was recognized that the state had the right to inspect articles in interstate

commerce and require an inspection fee, when the fees collected did not unreasonably exceed the cost of the administration of the law. In that case, the *General Oil Co.* case, though decided only a few years previous, was not referred to. Neither was there any discussion as to when an article is, and when it is not, in interstate commerce. It seems from the opinion to have either been assumed or conceded that the inspection law of Maryland covered interstate commerce, so far as the oysters coming from other states were concerned. The question considered in the *General Oil Co.* case was, when had an article lost its character of interstate commerce and become a part of the mass of the property of the state. It seems obvious that the court, in the *Foote* case, did not intend to overrule the *General Oil Co.* case without referring to it, and without discussing the question involved in that case. Speaking of the excess of the inspection fees collected over the cost of inspecting the oysters, the court observed that the excess collected "may have been valid as a tax on property in Maryland, but was a burden on interstate commerce when levied upon oysters coming from other states." We are aware that the supreme court of Ohio, in *Castle v. Mason*, 91 Ohio St. 296, 110 N. E. 463, and the supreme court of North Dakota, in *Bartles Northern Oil Co. v. Jackman*, 29 N. D. 236, 150 N. W. 576, have placed a different construction upon the *Foote* case from that which we have. Both of these courts construed the *Foote* case as authority for holding that an oil inspection law passed by the legislatures of the two respective states was an unlawful interference with interstate commerce. While we entertain great respect for the opinions of both the supreme court of Ohio and of North Dakota, we are yet constrained to say that, it seems to us, those courts have not correctly interpreted the holding in the *Foote* case. The supreme court of Minnesota, in *State v. Bartles Oil Co.* (Minn.), 155 N. W. 1035, declined to follow the construction placed upon the *Foote* case by the supreme courts of Ohio and North Dakota.

That court was of the opinion that the *Foote* case did not overrule the *General Oil Co.* case. Upon the question of interstate commerce, as already indicated, we think that the oil inspection law of this state does not interfere with the paramount authority of Congress to regulate such commerce.

The fourth question is whether section 1 of the 14th amendment of the Federal constitution, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property, without due process of law; or article 1, section 3, of the constitution of the state of Washington, which provides for due process of law, are impinged by the enforcement of the oil inspection law. The law does not abridge the privileges or immunities of citizens of the United States, because it applies equally to all persons selling or offering for sale the articles mentioned in the statute, whether such persons be citizens of this state or other states of the Union. As to due process of law, no authorities are cited which would show that the enforcement of the law conflicts with that provision of the constitution, and we know of none which so hold. Neither is any reason suggested which would justify such a holding.

The fifth question is whether the oil inspection tax provided for conflicts with article 7, section 2, of the state constitution, which provides for "uniformity and equality" of taxation; or section 5, of the same article, which provides that "no tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same, to which it only shall be applied." It has become the settled doctrine of this state that the provisions of the state constitution, found in article 7, relative to taxation, refer to taxes upon property, and have no application to taxes upon trades, professions, or occupations, or to privilege or excise taxes. *Fleetwood v. Read*, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205; *Stull v. De Mattos*, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; *In re Garfinkle*, 37 Wash. 650, 80 Pac.

188; *Seattle v. King*, 74 Wash. 277, 133 Pac. 442; *State v. Sheppard*, 79 Wash. 328, 140 Pac. 332; *State v. Collins*, *post* p. 310, 162 Pac. 556.

The sixth question is, does the oil inspection law impose a tax upon property, or provide for a tax upon a business, occupation, or an excise tax. If it is a tax on property, the law could not be sustained because of the lack of uniformity and equality. On the other hand, if it is a tax on the business or occupation or privilege, or an excise tax, the law is not invalid unless there is some constitutional provision limiting the amount of such taxation.

In *State v. Clark*, 30 Wash. 439, 71 Pac. 20, it was held that the inheritance tax law, which provided for the taxation of inheritances, was not invalid by reason of exempting some and laying proportional taxes on others, since the charges provided for were upon the passing of the estate by succession, and not a tax upon property. It was there said:

"The objection urged here, that the statute is in conflict with §§ 1, 2, and 5 of article 7 of the state constitution, relating to taxation, is not tenable, because the charge made upon the passing of the estate is not a tax on property. It is an impost or excise on the right to pass the estate and the privilege of the devisee to take. That it is not within the provision relating to the tax on property is well settled by practically unanimous authority."

In *State v. Sheppard*, 79 Wash. 328, 140 Pac. 332, the court considered an act of the legislature fixing a license fee to be collected from peddlers. It was there held that this license fee, or tax, was not a property tax.

The constitution of the United States provides:

"No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken." Const., art. 1, § 9.

The Federal supreme court, in construing this section, holds that the direct tax there provided for is a property tax, as distinguished from an impost, excise, or tax on a

business, occupation, or profession. In *Thomas v. United States*, 192 U. S. 363, that court had before it an act of Congress requiring the payment of a stamp tax upon memorandums or contracts of sale of certificates of stock. In answer to the contention that this was a property tax, it was said:

"The sale of stocks is a particular business transaction in the exercise of the privilege afforded by the laws in respect to corporations of disposing of property in the form of certificates. The stamp duty is contingent on the happening of the event of sale, and the element of absolute and unavoidable demand is lacking. As such it falls, as stamp taxes ordinarily do, within the second class of the forms of taxation."

In *Patton v. Brady*, 184 U. S. 608, it was held that an act of Congress providing for a tax of twelve cents per pound upon tobacco and snuff, however prepared, manufactured and sold, or removed for consumption or sale, was not a direct tax, and therefore was not in conflict with the Federal constitution. It was there said:

"It is true other counsel in their brief have advanced a very elaborate and ingenious argument to show that this is a direct tax upon property which must be apportioned according to population within the rule laid down in the *Income Tax* cases, but, as we have seen, it is not a tax upon property as such but upon certain kinds of property, having reference to their origin and their intended use."

The payment of the fee required by the oil inspection act is not an absolute and unavoidable demand, but is to be paid only upon the contingency that the oil is sold or offered for sale. If neither the inheritance law nor the license law imposes a tax on property, and the corporation stamp tax, and the tobacco and snuff tax are not direct taxes, it would seem to follow that the oil inspection law did not impose a tax upon property as such, but only upon the privilege of selling or disposing of such property. Whether it is called an occupation tax, a tax upon the right to sell, or an excise

tax, is immaterial. If the tax is not a property tax, there is no constitutional restraint upon the power of the legislature to require it. The state constitution is a limitation upon the actions and powers of the legislature, instead of a grant of power. So far as the power of the legislature is not limited by the constitution, it is unrestrained. In *Fleetwood v. Read, supra,* upon this question, the court observed:

". . . the state constitution is a limitation upon the actions and powers of the legislature instead of a grant of power, that the power of the legislature to tax trades, professions and occupations is, in the absence of constitutional restriction, a matter within its absolute control and resting entirely in sound legislative discretion."

In *State v. Sheppard, supra,* it was said:

"The only taxes mentioned in article 7, or elsewhere in the constitution are property taxes, and from the reading of that article as a whole, we are of the opinion that the limitation here sought to be invoked is no more applicable to this tax than the equality rule is applicable to the inheritance tax. This tax, like the inheritance tax, finds no mention in the constitution, and like the inheritance tax, is exacted by virtue of the inherent power of the legislature, unrestrained, we think, by any constitutional rule of the exercise of that power."

It may be true that, if the law is to be regarded purely as an exercise on the part of the legislature of the police power, the inspection fees must be limited to what is reasonably necessary to pay the cost of inspection, labeling, and administering the law, but upon this no opinion is expressed. Even if the law could not be sustained as an exercise of the police power, it yet is the duty of the court to sustain it under the power of the legislature to levy a tax not upon property, since it is properly sustainable under that power.

In *Stull v. De Mattos,* 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892, it was held that an ordinance charging an auctioneer's license was valid as an exercise of the taxing power,

even though it could not be upheld as a legitimate exercise of the power to regulate business.

In *General Oil Co. v. Crain*, *supra*, the oil inspection law of the state of Tennessee was considered as one involving the power of taxation. The court cannot concern itself with the purpose or motive which prompted legislative action, so long as that action does not conflict with any constitutional mandate. The enforcement of a law, passed in the exercise of power possessed by a coordinate branch of the government, cannot be restrained, even though the court may believe that the law is unjust, unreasonable, or, as a matter of public policy, unwise.

In *McCray v. United States*, 195 U. S. 27, the following observations appear:

"It is, however, argued if a lawful power may be exerted for an unlawful purpose, and thus by abusing the power it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this, that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its power by another department.

"The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions. . . .

"It is, of course, true, as suggested, that if there be no authority in the judiciary to restrain a lawful exercise of

power by another department of the government, where a wrong motive or purpose has impelled to the exertion of the power, that abuses of a power conferred may be temporarily effectual. The remedy for this, however, lies, not in the abuse by the judicial authority of its functions, but in the people, upon whom, after all, under our institutions, reliance must be placed for the correction of abuses committed in the exercise of a lawful power."

On one or two of the questions herein considered, other than the question of interstate commerce, there is dictum in *State v. Bartles Oil Co., supra,* and a holding in *Collins v. Morris,* 97 Kan. 264, 155 Pac. 51, not in harmony with the views we have expressed. To review those cases would unnecessarily extend this opinion, which has already seemingly become disproportionate in length. Suffice it to say that, in our opinion, the conclusions we have reached are not only sustained by the authorities, but have the better reason in their support.

The judgment will be reversed, and the cause remanded to the superior court with direction to dismiss the action.

ELLIS, C. J., MOUNT, PARKER, CHADWICK, MORRIS, FULLERTON, and HOLCOMB, JJ., concur.

[No. 13316. Department Two. January 15, 1917.]

The State of Washington, *Appellant*, v. B. W. Collins, *Respondent*.[1]

Licenses—Automobiles — Fees — Liability of City — Statutes. An automobile owned by a city and operated by an employee in the light and power department is not exempted from the operation of the state license law, Rem. Code, §§ 5562-1 and 5562-4, prohibiting the operation without a license of all automobiles except those owned by a city and used "exclusively" for the police or fire departments.

Same—Uniformity—Taxation. Rem. Code, § 5562-4, providing a license tax on all automobiles, is not a tax on property but is enforcible as a license or occupation tax, and hence does not violate Const., art. 7, § 2, relating to uniformity and equality in taxation, which does not apply to privilege or excise taxes.

Licenses—Liability of City—Taxation. The proviso to Const., art. 7, § 2, exempting the property of municipal corporations from taxation cannot be segregated from the provisions of the body of the section, and hence applies only to taxes on property and not to occupation taxes.

Appeal from a judgment of the superior court for Pierce county, Card, J., entered January 7, 1916, upon sustaining a demurrer to the information, dismissing a prosecution for operating an automobile without a license. Reversed.

The Attorney General and *Edward W. Allen, Assistant*, for appellant.

U. E. Harmon and *Frank M. Carnahan* (*T. L. Stiles*, of counsel), for respondent.

Morris, J.—Appeal from a judgment of dismissal upon the sustaining of a demurrer to an information charging respondent with operating an automobile without a license.

The respondent is an employee of the city of Tacoma. The automobile is owned by the city, and was operated by respondent in connection with the light and power depart-

[1]Reported in 162 Pac. 556.

ment of the city. The questions submitted by the appeal naturally divide themselves into two. First, does the law cover automobiles owned by the city, and second, if it does, is such inclusion constitutional?

Chapter 142, Laws of 1915, p. 385 (Rem. Code, § 5562-1 *et seq.*), is a complete act relating to the operation of automobiles. Section 4 (Id., § 5562-4) of the act provides that no motor vehicle shall be operated upon any public highway without a license first having been obtained therefor, "except as hereinafter provided." Section 17 (Id., § 5562-17) contains the exception referred to in § 4, and provides that, "motor vehicles owned by any city for the police or fire department thereof, and used exclusively in those departments; . . . shall be exempt from payment of license fees." These two sections answer the first inquiry in the affirmative. The intent of the act is plainly to cover all motor vehicles owned by any city except those used exclusively in the police and fire departments. The act recognizes that the city, in providing for police and fire protection, is exercising governmental functions, and that, in the exercise of such functions, it may use motor vehicles without subjecting such vehicles to the payment of license fees. In operating light and power departments, the city is acting in a proprietary capacity, and the automobiles used by it in such capacity fall neither within the language nor the reason of the exception.

The lower court answered the second inquiry in the negative, upon the theory that the license fee required by this act was a property tax, and that, under § 2 of art. 7, of the constitution, all property of municipal corporations is exempt from taxation. This is an untenable theory. The constitutional provision is as follows:

"The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and cor-

poration shall pay a tax in proportion to the value of his, her, or its property: Provided, That a deduction of debts from credits may be authorized; Provided further, that the property of the United States, and of the state, counties, school districts, and other municipal corporations, and such other property as the legislature may by general laws provide, shall be exempt from taxation." Const., art. 7, § 2.

This section has been uniformly construed by this court to apply to a property tax only, and has no application to occupation, privilege or excise taxes. *Fleetwood v. Read*, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205; *Stull v. De Mattos*, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; *State v. Clark*, 30 Wash. 439, 71 Pac. 20; *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466; *State ex rel. Pratt v. Seattle*, 73 Wash. 396, 132 Pac. 45; *State v. Sheppard*, 79 Wash. 328, 140 Pac. 332.

A license fee, such as is provided for in this act, may or may not be a tax, depending upon whether its imposition is tied to the police or taxing power of the state. But giving respondent the benefit of his contention that this license fee is imposed under the taxing power of the state, it is clear that it is not a property tax, but is in the nature of a license or privilege tax. Such was the basis of the rule announced in *Seattle v. King*, 74 Wash. 277, 133 Pac. 442, sustaining the power of the city to impose a license fee upon automobiles for hire. That a license fee such as is here involved is enforcible as an occupation tax is held in *Ruggles v. State*, 120 Md. 553, 87 Atl. 1080; *Ex parte Kessler*, 26 Idaho 764, 146 Pac. 113, L. R. A. 1915D 322; *In re Schuler*, 167 Cal. 282, 139 Pac. 685, Ann. Cas. 1915C 706; *Harders Fireproof Storage & Van Co. v. Chicago*, 235 Ill. 58, 85 N. E. 245; *State v. Ingalls*, 18 N. M. 211, 135 Pac. 1177; *Kane v. Titus*, 81 N. J. L. 594, 80 Atl. 453, Ann. Cas. 1912D 237; *In re Hoffert*, 34 S. D. 271, 148 N. W. 20, 52 L. R. A. (N. S.) 949.

Another error manifest in the theory of the lower court is in segregating the constitutional proviso from the body of

the section. A constitutional or statutory proviso is a restraint or limitation upon, and not an addition to, that which precedes it. It is, therefore, clear that the proviso found in § 2 of art. 7 is a restraint upon the power of the state to impose a general property tax upon the property of municipalities, and in no sense can be construed as a limitation upon the power to impose an occupation, license, or privilege tax.

We shall not review the authorities relied upon by respondent. They are cited upon the assumption that this license fee is a property tax. Holding otherwise, it is enough to say that they are not apposite to the points involved.

The judgment is reversed.

MOUNT, FULLERTON, PARKER, and HOLCOMB, JJ., concur.

[No. 13544. Department Two. January 18, 1917.]

THE STATE OF WASHINGTON, *Appellant*, v. L. J. MARTIN, *Respondent*.[1]

CRIMINAL LAW—APPEAL—APPEAL BY STATE—ARREST OF JUDGMENT. Rem. Code, § 1716, subd. 7, expressly confers upon the state the right to appeal from an order granting a motion in arrest of judgment.

RECEIVING STOLEN GOODS—INFORMATION—SUFFICIENCY — NAME OF OWNER—STATUTES. Under Rem. Code, § 2601, making it larceny for any person, with intent to deprive the owner thereof, . . . knowing the same to have been so appropriated, to . . . receive . . . any property wrongfully appropriated in such manner as to constitute larceny, an information need not allege the name of the owner of the stolen property, where it charges that accused unlawfully and feloniously received certain cows from J. N. and W. T., knowing the same to have been stolen with intent to deprive the owner thereof of his property; since it is sufficient under §§ 2055 and 2066, to charge the offense substantially in the language of the statute in orderly and concise language so that a person of common understanding may know what is intended.

[1]Reported in 162 Pac. 356.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered January 22, 1916, granting a motion in arrest of judgment, after a trial and conviction of larceny. Reversed.

J. D. McCallum, for appellant.

Wilson & McDermont and *R. M. Dye*, for respondent.

WEBSTER, J.—Respondent was accused, and upon trial found guilty, of the crime of larceny by receiving stolen property. From an order granting a motion in arrest of judgment, the state appeals.

Respondent moves to dismiss the appeal upon the ground that the state has no right of appeal from an order granting a motion in arrest. Rem. Code, § 1716, subd. 7, expressly confers upon the state the right to appeal from such order. The motion to dismiss will be denied.

It is contended that the information is fatally defective in that it fails to allege the name of the owner of the stolen property. This presents the only question for consideration. The prosecution is based upon Rem. Code, § 2601, the applicable portions of which read as follows:

"Every person who, with intent to deprive or defraud the owner thereof . . . 5. . . . knowing the same to have been so appropriated, shall . . . receive . . . any property wrongfully appropriated, whether within or outside of this state, in such manner as to constitute larceny under the provisions of this act—

"Steals such property and shall be guilty of larceny."

The essential elements of the crime, therefore, are (1) the property must have been appropriated in such manner as to constitute larceny; (2) the accused must have known that the property had been so appropriated; (3) the property must have been received by him with the felonious intent to deprive or defraud the owner thereof. The charging part of the information follows:

"That said L. J. Martin on the 4th day of November, 1914, at the county of Lincoln, state of Washington, did then and there unlawfully and feloniously receive from Jimmie Nee and William Thornburg personal property, to-wit: seven cows and three calves knowing said personal property to have been stolen with intent to deprive the owner thereof of his property, said cows and calves, the said property being then and there of the value of three hundred fifty ($350) dollars, coin of the United States of America."

It will be seen that it is inferentially though sufficiently alleged that the property was stolen (*State v. Druxinman*, 34 Wash. 257, 75 Pac. 814); that the accused knew it was stolen, and that he received it with the intent to deprive the owner thereof. Thus the elements of the crime seem to be charged. In stating the acts constituting the particular offense, for the purpose of identifying the transaction relied upon for conviction, the information alleges the names of the persons from whom the property was received, describes the property as being seven cows and three calves, and contains appropriate allegations of time and place. Under §§ 2055 and 2066 of the code, this court has consistently held that an information which charges the crime substantially in the language of the statute defining it, and states the acts constituting the offense in ordinary and concise language so that a person of common understanding may know what is intended, is sufficient. That many allegations which were considered to be indispensable in charging crimes at common law are not necessary under this rule is obvious. Especially is this true with respect to descriptive allegations merely. Indeed, the very purpose of the sections of the code referred to was to do away with many of the common law technicalities, and it must not be overlooked that the question presented in this case is whether the offense charged was sufficiently described. How could respondent fail to know either the crime with which he was charged or the particular offense or transaction upon which the state relied for conviction? While the information is inartificially drawn and is not to be ap-

proved as a model, when subjected to the test uniformly applied in this state it seems to be sufficient.

The cases holding that it is necessary to allege ownership in charging the crime of receiving stolen property, and there are many such cases, are based not upon the idea that ownership is an essential element of the crime, but that an allegation of ownership is necessary as a matter of description; that the transaction is identified not only by a description of the property, but also by the ownership; that identity of the property embraces the element of ownership as a necessary part of the description. The fundamental reason upon which these cases seem to be based is that the information or indictment must upon its face so completely identify the transaction that a judgment of conviction or acquittal would constitute a bar to a subsequent prosecution for the same offense. In view of the rule permitting parol evidence to be introduced for the purpose of identifying the offense where a plea of former jeopardy is interposed, this reason loses much of its force. These cases hold also that, if the name of the owner is unknown, an allegation to that effect will excuse the failure to state ownership. It is difficult to see how an allegation that the owner is unknown would in any manner tend to identify the offense for any purpose. Manifestly it would not furnish the accused any useful information nor assist him in the preparation of his defense; and if the judgment subsequently should be pleaded in bar of another prosecution, the identity of the offense would have to be established by looking to other descriptive allegations or by resorting to oral testimony. But no useful purpose can be served by further analyzing these cases. It is sufficient to say that they are not in keeping with the spirit of our code, nor in line with our decisions from territorial times to the present.

"The experience of advancing ages culminated in legislation that has done away with the refinements of technical pleading so far as criminal actions are concerned, refinements which were originally intended as safeguards to the

innocent, but the practical operation of which has been to protect the guilty from merited punishment. These refinements have given place to the simplicity of a statement of facts, and the law in the interest of justice to the state and to society has laid down the plain test mentioned above. And this is a test which appeals to common sense." *State v. Turner*, 10 Wash. 94, 38 Pac. 864.

In *State v. Ray*, 62 Wash. 582, 114 Pac. 439, where the crime charged was receiving stolen property, it was said:

"Appellant also argues that there was no proof that the stolen wheat was the property of the Northern Pacific Railway Company. There is no merit in this assignment, because it was shown that the wheat was taken from the possession of the railway company, and that company lost that amount of wheat. . . . *Also, because it was shown that the wheat was stolen wheat, and appellant knew that fact.*"

If it is necessary only to prove that the property was stolen, as this language clearly implies, then a failure to allege ownership would not render an information bad. Counsel for respondent cites *State v. Hall*, 54 Wash. 142, 102 Pac. 888; *State v. Morgan*, 31 Wash. 226, 71 Pac. 723, and *State v. Dengel*, 24 Wash. 49, 63 Pac. 1104. In *State v. Hall*, the court held merely that an information for robbery, which charged that property belonging to the Spokane Merchants Association had been feloniously taken *from the immediate presence* of one Parsons, but which did not allege that Parsons at the time was exercising control or dominion over the property, was insufficient. In both *State v. Morgan* and *State v. Dengel*, the charge was larceny from the person, and the court held the informations bad for failure to allege ownership. At first blush these cases may seem to be in conflict with our present views, but on closer study they will be seen not to be so. The crime of larceny from the person is an aggravated or compound larceny and necessarily includes all of the elements of simple larceny. Property cannot be stolen unless it is stolen from some one. Consequently one of the essential elements of simple larceny, and therefore

of larceny from the person, is ownership, and failure to make such allegation would be to omit one of the elements of the crime. This is true also of robbery. While receiving stolen property is defined by our statute as one of the ways of committing the crime of larceny, plainly the inherent nature of the transaction is not thereby changed. Receiving stolen property continues to be a sort of secondary crime based upon a prior commission of the primary crime of larceny. It presupposes, but does not include, larceny. Therefore the elements of larceny are not elements of the crime of receiving.

No case to which our attention has been called holds that ownership is an essential element of the crime of receiving stolen property. The well established rule, that it is generally sufficient to charge a statutory crime in the language of the statute creating it, applies only to those cases in which the statute defines the offense; that is to say, where the definition of the crime includes all of the essential elements. If confusion is to be avoided, the distinction between alleging essential elements and matters of description merely must be kept in mind.

The order granting the motion in arrest will be reversed, and the cause remanded with directions to pronounce sentence and enter judgment upon the verdict.

MORRIS, MOUNT, FULLERTON, and PARKER, JJ., concur.

[No. 13201. *En Banc.* January 20, 1917.]

D. A. DUFFY, *Respondent*, v. J. FRED BLAKE, *Appellant*.[1]

APPEAL—DECISION—LAW OF CASE—POINTS NECESSARILY DECIDED. Where, on appeal from a judgment of nonsuit, the case was reversed and remanded for a new trial without expressly referring to respondent's claim that a certain part of the testimony was inadmissible, the effect of the decision was to hold that the testimony was admissible, as otherwise the error would have been pointed out to guide the second trial, and hence becomes the law of the case and conclusive upon a retrial and a second appeal.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 8, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages for fraud. Affirmed.

Kerr & McCord and *Eugene A. Childe*, for appellant.

Carkeek & McDonald and *Geo. Coryell* (*E. C. Hughes*, of counsel), for respondent.

ON REHEARING.

MAIN, J.—The purpose of this action was to recover damages on account of false representations. Two trials have been had in the superior court, and this is the second appeal to this court. The opinion upon the first appeal is reported in 80 Wash. 643, 141 Pac. 1149, where the facts are fully stated, and need not here be repeated. The plaintiff, upon the first trial in the superior court, was nonsuited, and a judgment of dismissal entered. Upon that trial, the testimony of one A. A. Carlin was admitted as a part of plaintiff's case. Upon the appeal, respondent opened his brief with the contention that the testimony of Carlin was inadmissible, and, after arguing the question, asked the court to disregard it in determining whether the nonsuit had been properly granted. The decision of the court upon that appeal was that there was sufficient evidence to carry the ques-

[1]Reported in 162 Pac. 521.

tion of fraud to the jury, and that the trial court was in error in granting the nonsuit. The testimony of Carlin is not expressly referred to in the opinion, but the court concludes with the statement that, upon the testimony of the plaintiff and "his witnesses, we are satisfied that it was the duty of the court to submit the case to the jury." Upon the second trial in the superior court, the testimony of Carlin was again admitted in evidence over defendant's objection. In that trial, the plaintiff prevailed, and from the judgment entered upon the verdict, the defendant appeals.

The department of the court to which this appeal was first here presented was of the opinion that the testimony of Carlin was not properly admitted. *Duffy v. Blake*, 91 Wash. 140, 157 Pac. 480. After the opinion of the department had been filed, a petition for rehearing was presented and granted. Upon the rehearing, the pivotal question was whether the right to introduce Carlin's testimony was determined upon the first appeal and, therefore, became what is known as the law of the case. In reviewing the judgment of nonsuit upon the first appeal, the court necessarily considered all the evidence. The respondent, in his brief, had challenged certain of this evidence as incompetent. Had the court then been of the opinion that the evidence of Carlin had been improperly admitted, it would undoubtedly so have pointed out in the opinion, in order that the trial court, upon the second trial, might be advised of the views of this court, and, in accordance therewith, could rule upon the testimony when it was offered. The admission of the testimony of this witness, if error, was not one which was incidental to the particular trial and not likely to occur upon a retrial of the case, but the question was one that would necessarily arise upon a second trial, and was vital.

In *Taylor v. Gale*, 24 Wash. 336, 64 Pac. 533, the plaintiff had brought an action to establish a claim which had been presented to an administratrix and rejected. In that case there were two appeals. The first appeal was prosecuted

by the plaintiff. The defendant in that case, who was the respondent upon the first appeal presented the question of the insufficiency of the claim on account of defective verification. The opinion of the court upon the first appeal made no reference to the verification of the claim. Upon the second trial in the superior court, the claim was again offered and rejected. The judgment was against the plaintiff, and he again appealed. Upon the second appeal, it was held that, upon the first appeal, it must necessarily have been the view of the court that the claim should not be rejected on account of defective verification, even though no mention of that fact was made in the opinion. The cause was again reversed, and remanded for a new trial, the court, upon the second appeal, not passing upon the admissibility of the claim, because the holding of the court upon the former appeal had become the law of the case. After referring to the argument of the respondent upon the first appeal, the court used this language:

"From this it is evident that the court must have concluded (although for some reason no expression was made in the opinion to that effect) that no error had been committed by the lower court in admitting the claim; for it would be not only a foolish but harmful practice to reverse a case and order a new trial, and put the appellant to the delay and expense of a new trial, when it would necessarily follow that the trial could not result in a judgment in his favor."

There is no substantial difference between the situation presented in the present case and that which confronted the court in that case. In *Crooker v. Pacific Lounge & Mattress Co.*, 34 Wash. 191, 75 Pac. 632, there had been a previous appeal from a judgment of nonsuit, which judgment had been reversed and the cause remanded. Upon the first appeal, the defendant and respondent, in its brief, argued that the judgment of the trial court, among other reasons, should be sustained because the plaintiff was guilty of con-

tributory negligence. In deciding the case, this particular matter was not discussed. Upon the second trial, the same evidence appeared in the record, and the plaintiff having prevailed, the defendant appealed. The question was again presented, and the court used this language:

"The above matters were in the record before this court on the first appeal, and the question of contributory negligence was elaborately argued by the respective counsel, on both sides of the controversy, from the same standpoint as now presented here by appellant. It is true that in a former opinion the duty of the then respondent to have provided a guard or spreader for the saw, pursuant to the promise of its foreman, was the principal question discussed and considered by this court; still, evidence of the above character was properly in the record; and, as we reversed the decision of the trial court granting respondent's motion for a nonsuit, and remanded the case for a new trial, it seems to us that, under the well settled rule, this holding has become the law of the case, and we are bound by it on this appeal, even though it may not meet with our approval at this time." (Citing authorities.)

While it may be that, in the decisions of the courts of some other jurisdictions, a different rule has been announced, yet the two cases above cited are exponents of the general rule. In Hayne on New Trial and Appeal (Revised Edition), vol. 2, § 291, this language is used:

"Under the rule of *stare decisis*, as shown in the preceding section, if a decision be clearly erroneous and rights have not grown up under it to any great extent, it may be overruled. But this is not true of a subsequent appeal *in the same cause*. However erroneous a decision of the supreme court may be, it must be adhered to in all subsequent stages of the same case. It becomes the law of the case and cannot be disregarded either by the trial court or by the supreme court. This rule is firmly established."

The two cases above cited, and the other authorities upon the same question, were presented for the first time upon the rehearing. Under those cases, even though it was the opinion of the department to which the present appeal was first pre-

sented that the testimony of Carlin was not admissible, yet that question is not now open for determination, and is ruled by the opinion upon the first appeal. Upon the admissibility of the testimony, we here express no opinion.

So far as the opinion of the department may not be in harmony with the views here expressed, it will be considered modified.

The judgment will be affirmed.

ELLIS, C. J., MOUNT, HOLCOMB, PARKER, and CHADWICK, JJ., concur.

[No. 13343. Department Two. January 24, 1917.]

PHOENIX ASSURANCE COMPANY, LIMITED, *Respondent*, v. COLUMBIA & PUGET SOUND RAILROAD COMPANY, *Appellant*.[1]

COSTS—ON APPEAL—PREVAILING PARTY—ABIDING RESULT. Where a case is reversed for new trial for error that was partly the fault of appellant, it is inadvertent to award him the costs of the appeal; nor can they be awarded to the respondent, in view of Rem. Code, § 1744, which provides that, when a new trial is ordered, the court may in its discretion direct that costs of the prevailing party shall abide the result of the action; which should be the order in such a case.

Motion to modify judgment for costs, filed in the supreme court September 5, 1916. Granted.

Farrell, Kane & Stratton and *Stanley J. Padden*, for appellant.

Shepard, Burkheimer & Burkheimer, for respondent.

MOTION TO MODIFY.

PER CURIAM.—By the original opinion of this department in this case (92 Wash. 419, 159 Pac. 369), the case was re-

[1]Reported in 162 Pac. 519.

manded for a new trial on account of error by the trial judge. It was then shown that the error was in part the fault of appellant. Costs of appeal were allowed appellant as for a complete reversal. This was inadvertent. Respondent has moved for modification, either to allow respondent costs of appeal, or to order that such costs abide the result of the action.

Costs cannot be awarded to the respondent under the statute because it is not the "prevailing party" on appeal. Section 1744, Rem. Code, provides:

"And when the judgment is reversed and a new trial ordered, the court may in its discretion direct that costs of the prevailing party shall abide the result of the action."

That should have been the order in this case, under the circumstances. Respondent's second alternative request for modification will be granted.

It is therefore ordered that the original opinion be and is hereby corrected and modified so that neither party shall recover costs of appeal presently, but the same shall abide the result of the action and go to the party finally successful.

[No. 13375. *En Banc.* January 24, 1917.]

GEORGE SHAUGHNESSY, *Respondent*, v. NORTHLAND STEAMSHIP COMPANY, *Appellant*.[1]

MASTER AND SERVANT—SAFE PLACE—DEFECTIVE GUARDS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The negligence of the master and the contributory negligence of the servant, are questions for the jury, where it appears that an employee, going to his work in the hold of a ship, fell through the hatch, when an iron stanchion at a corner of the hatch upholding a guard rope gave way when the employee, holding onto the rope, was starting in the usual way to descend the hatch ladder, it being necessary for him to take hold of either the rope or the top of the hatch coaming, and the rope and stanchion being apparently strong enough to support the weight of a man.

APPEAL—REVIEW—HARMLESS ERROR — VARIANCE. In a servant's action for personal injuries, where the proof does not constitute such a variance as to work to the prejudice of the appellant, error cannot be based upon the failure of the court to strictly confine the issues to the alleged necessity of an employee's taking hold of a rope that gave way and caused him to fall.

SAME—WORKMEN'S COMPENSATION ACT—EMPLOYMENTS COVERED—MARITIME SERVICE—ADMISSIBILITY. The workmen's compensation act compelling all employers and employees engaged in extra hazardous employments to submit to compulsory insurance in lieu of common law remedies, has no application to an employee engaged in unloading a ship lying at a dock in the navigable waters of Puget Sound; since to apply the act to relations arising from maritime service, which are under the legislative control and jurisdiction of the Federal government, would make it operate unequally as between employers or employees, and the state has no power to abolish the remedies afforded by the maritime laws of the United States.

SAME. In such a case, it is immaterial whether the ship was engaged in intrastate or interstate commerce, so long as it was not in inland waters having no connection with the high seas.

SAME. It being impossible to compel the ship master to contribute to the accident fund in such a case, it could not have been the intent of the legislature to give his employees the right to compensation from the fund.

SAME—WORKMEN'S COMPENSATION ACT—MARITIME SERVICE—RIGHT TO COMPENSATION—REMEDIES—ADMIRALTY. Under Rem. Code, § 6604-

[1]Reported in 162 Pac. 546.

27 of the workmen's compensation act, providing that, if any employer shall be adjudicated to be outside of the lawful scope of the act, the act shall not apply to his workmen, an employee injured while engaged on a ship in maritime service is not relegated to his remedies in admiralty, by reason of § 6604-1, which abolishes all civil actions for personal injuries in extra hazardous work; since, being outside the lawful scope of the act, all his rights and remedies remain unimpaired as if the act had never become a law of the state.

SAME—WORKMEN'S COMPENSATION ACT—EMPLOYMENTS COVERED—"STEAMBOATS," ETC. Rem. Code, § 6604-2, extending the provisions of the workmen's compensation act to "steamboats, tugs, and ferries," must be construed to apply only to vessels operating upon the inland navigable waters of the state over which the jurisdiction of the state courts are exclusive.

COURTS—DECISIONS OF FEDERAL COURTS — WORKMEN'S COMPENSATION ACT. The right to maintain an action in the state court under the workmen's compensation act is a state question upon which a decision of a Federal district court is not controlling in the state courts.

JUDGMENT—ENTRY—POWER TO CORRECT. A clerk's minute entry of a judgment of dismissal is properly set aside and expunged as inadvertent where it was entered without the knowledge of court or counsel, upon the court's oral announcement of an intent to order a dismissal notwithstanding the verdict, upon which the matter was postponed until counsel could prepare a formal judgment to be presented to the court; and hence does not prevent the court from entering a different judgment when the matter was presented to him with counsel for both parties before the court pursuant to the previous understanding.

Appeal from a judgment of the superior court for King county, Frater, J., entered October 28, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee engaged in unloading a steamship. Affirmed.

Bronson, Robinson & Jones, for appellant.

Brady & Rummens (*Thos. B. McMartin*, of counsel), for respondent.

PARKER, J.—The plaintiff, Shaughnessy, commenced this action in the superior court for King county, seeking recovery

of damages for personal injuries claimed by him to have resulted from the negligence of the defendant steamship company while he was working for that company in the hold of its steamship Alki assisting in its unloading, while it was lying in the navigable waters of Puget Sound alongside a wharf in the city of Anacortes. The trial resulted in verdict and judgment in favor of the plaintiff, awarding him $3,500 damages, from which the defendant has appealed to this court.

It is first contended in appellant's behalf that the trial court erred in refusing to sustain its counsel's challenge to the sufficiency of the evidence, timely made, and decide, as a matter of law, that appellant was not guilty of negligence and that respondent's injuries were the result of his own negligence. It was while returning to his work after having his supper on the day in question that respondent received the injuries for which he here sues to recover. He was required to go to his work in the hold of the ship through the hatch down a ladder. The hatch was about twelve feet square, its coaming rising some ten inches above the deck. The ladder down which the employees were required to go into the hold to their work was stationary, perpendicular, and set back under the edge of the hatch some four or five inches so as to avoid coming in contact with the cargo sling as it was lowered into or raised from the hold in loading or unloading the ship. While the hatch was open and the unloading proceeding, there was placed around it in the usual manner a rope run through eyelets at the top of iron stanchions which were set in the deck at each corner of the hatch just outside the coaming, so that the rope ran parallel with the sides of the hatch some two feet or more above the deck over the edge of the hatch. The stanchions and rope constituted a railing which was apparently strong enough to at least bear the weight of a man, whether such weight might come in contact with the rope laterally or directly downward. When respondent returned to his work after supper and started

to go down into the hold, he took hold of the rope with his hands, or at least with one hand, reached one foot down to the upper rung of the ladder, evidently intending to descend backward, as was usual; and, proceeding upon the assumption that the rope was strong enough and the stanchion sufficiently secure to bear his weight, allowed his weight to come upon the rope. One of the stanchions gave way where it was set into the deck, and this sudden giving away and slackening of the rope caused him to lose his hold and fall into the hold, some twenty feet below, resulting in his injuries.

It seems quite plain to us that, in view of the position of the rope with reference to the ladder, its apparent strength, and the apparent strength and security of the iron stanchions which held it in place, and the fact that to start to descend the ladder necessarily required respondent to take hold of either the top of the hatch coaming or the rope, it cannot be said, as a matter of law, that appellant was free from negligence in having the rope in this position less secure than it apparently was, or that respondent was guilty of contributory negligence in taking hold of the rope and depending upon it to temporarily support him rather than entirely depending upon a hold upon the hatch coaming. The jury might have well concluded that the situation was such as invited respondent and others descending the ladder to take hold of the rope as well as the hatch coaming in starting to descend. We are quite clear that it cannot be held otherwise as a matter of law.

Some contention is made in appellant's behalf upon the theory that the complaint seems to be framed upon the assumption that respondent was necessarily required to take hold of the rope in starting to descend and that the proof fails to show that there was any real necessity for his so doing, the argument being apparently that there was no other issue in the case than that of the necessity of taking hold of the rope, so far as respondent's contributory negligence is concerned. We are convinced, however, that the

proof did not, in any event, constitute such a variance as worked to the prejudice of appellant upon the trial, and that it was enough to warrant the jury finding in respondent's favor that the situation was such as to in effect invite him to take hold of the rope preliminary to his descending into the hold. It seems quite clear to us that the court did not err in leaving the question of negligence, both on the part of appellant and respondent, to the jury, and that respondent was not prejudiced by the fact that the issues were not confined by the court strictly to the question of the necessity of taking hold of the rope by respondent.

What we regard as the most important question here presented is, Has our workmen's compensation act (Rem. Code, § 6604-1 *et seq.*) withdrawn from controversy in the courts causes of action of this nature arising out of employment such as respondent was engaged in at the time he was injured, and substituted therefor the remedy and compensation provided for by that act? This question was presented to the superior court by respondent's demurrer to appellant's first affirmative defense, and by appropriate motions, made during the course of the trial, invoking the provisions of the workmen's compensation act as a complete defense in this action. The trial court, by its rulings on the demurrer and the motions, declined to entertain this defense, being of the opinion that claims of this nature arising out of maritime employment are not withdrawn from controversy in the state courts and the right to compensation from the accident fund provided for by the act substituted therefor.

Our workmen's compensation act, let us be reminded, is one under which neither the employer nor the employee has any right of election as to whether he will come under and be governed by its provisions, so far as extra hazardous employment is concerned. Neither can exempt himself from the burdens which it imposes, nor by contract waive the benefits thereof in the sense that he can bar himself from the right to claim its benefits. The employee, by the terms of the act,

has taken away from him the right to sue in the courts upon his cause of action, and in lieu thereof is furnished indemnity in certain specified amounts, payable from the accident fund provided for in the act, according to the nature of his injury, regardless of the fault of his employer. The employer is compelled to contribute to the accident fund certain specified amounts, according to the hazardous nature of the work of his employees, and in return therefor is furnished indemnity against all claims of his employees for injuries received in the course of their employment. Thus the act in effect provides for compulsory insurance, both for the employer and the employee, and manifestly contemplates that *all employers* and *all employees*, who are compelled to come under the act and have their rights each as against the other controlled and determined by its provisions, shall enjoy such privileges and immunities equally, in harmony with the guaranty of § 12 of art. 1 of our state constitution. This evident spirit of the act, we think, points to a legislative intent to make the act applicable only to those relations of employer and employee which are in the legislative control of the state untrammeled by the laws of the United States and the jurisdiction of the courts of the United States, which might have the effect of rendering the privileges and immunities for which the act provides unequal as between employers or unequal as between employees. If these observations be sound, it seems to follow almost as a matter of course that, in so far as the maritime service of appellant's employees is concerned, it is not required to contribute to the accident fund provided for in the act out of which workmen are to be compensated for their injuries in lieu of the right to sue therefor in the courts, and such employees, injured while so engaged in maritime service, are not required to accept the limited compensation provided therefor out of the accident fund.

That the employment in which respondent was engaged for appellant was maritime in its nature, and that the question of his compensation for the injuries received by him here in-

volved are subject to controversy in admiralty in the Federal courts regardless of all state laws, seems quite clear in view of the fact that he was working upon the ship for appellant while it was lying in the navigable waters of Puget Sound. Nor does the fact that he was assisting only in unloading the ship instead of assisting in its navigation lessen his right to seek his remedy in admiralty. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 51 L. R. A. (N. S.) 1157; *Imbrovek v. Hamburg-American Steam Packet Co.*, 190 Fed. 229; *The Fred E. Sander*, 208 Fed. 724.

In our recent decision in *State ex rel. Jarvis v. Daggett*, 87 Wash. 253, 151 Pac. 648, L. R. A. 1916A 446, we reached the conclusion that a navigation company operating vessels upon Puget Sound is not required to contribute to the accident fund provided for by our workmen's compensation act to compensate its employees injured while engaged in maritime service. In that case, the question arose upon the petition of a maritime employee of the company injured while working upon one of its ships as an oiler. He presented his claim to the commission, seeking compensation from the accident fund provided for by the act. His claim was rejected by the commission upon the ground that the act did not give it any jurisdiction over such navigation companies and their employees engaged in maritime service. The injured employee then applied to this court for a writ of mandate to compel the commission to make demand upon and take proceedings to collect contributions to the accident fund from navigation companies to the end that his claim might be paid from such fund. While recognizing that certain language of the act presently to be noticed, which, read literally and apart, would seem to have the effect of subjecting such companies and their employees to the provisions of the act, Judge Main, speaking for the court, at page 257, said:

"The maritime law being a part of the law of the United States, the legislature of a state has no power to modify or abrogate it. *Workman v. New York City*, 179 U. S. 552.

It follows, therefore, that the legislature in passing the compensation act could not take from a workman any right which he had under the maritime law of the United States. The petitioner here still has the right to pursue his remedy in admiralty. Gathering the purposes of the act from all its provisions, we think it could not have been the legislative intent to attempt to encroach upon the admiralty jurisdiction of the Federal court. . . . It seems to be the purpose of the act to give the relief therein granted where the legislature had the power to abolish every other remedy. If companies operating boats upon Puget Sound are within the act, then they may be compelled to pay the percentage of their pay rolls specified, and yet be subject to a right of action in admiralty; while other persons or corporations engaged in a hazardous business not covered by admiralty law would be completely protected against the pursuit of any other remedy or proceeding. The owner of a steamboat, if he should pay the percentage of his pay roll specified, and his injured seamen should pursue their remedy in admiralty, would receive no protection from the act, and yet would be subject to its burdens. If the act were given this construction, it might well be doubted whether it would not offend against that provision of the fourteenth amendment to the constitution of the United States which provides that no state shall make or enforce any law which shall 'deny to any person within its jurisdiction the equal protection of the laws.'"

We note that the ship there in question was engaged in interstate as well as intrastate commerce; but the decision was rested upon the fact that the admiralty remedy remained unimpaired, which is not affected by the nature of the ship's commerce so long as it is not on inland waters having no connection with the high seas or another state. Now it seems almost unthinkable that the legislature ever intended to give to an employee the right to compensation out of the accident fund provided for in the act and at the same time not require his employer to contribute to that fund. So it seems to us that when it has once been determined, as it has been in the *Jarvis* case, that an employer whose employees are engaged in maritime service is not required to contribute to the acci-

dent fund, it necessarily follows that such employees cannot lawfully claim compensation from that fund. This, we think, became in effect as thoroughly settled by the *Jarvis* decision as that navigation companies are not required to contribute to the accident fund so far as the maritime service of their employees is concerned.

Does it follow that the act by its terms, assuming that it could do so, has taken away respondent's right to sue in the courts, other than in admiralty, for damages resulting in his injuries, as he is here doing? It seems to be so argued by counsel for appellant. Looking to the provisions of the act, ch. 74, page 345, Laws of 1911, Rem. Code, §§ 6604-1, 6604-2, 6604-27, so far as necessary to here notice them, we read:

"Section 1. . . . The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this act provided."

"Sec. 2. . . . This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are within the legislative jurisdiction of the state, in the following enumeration, and they are intended to be embraced within the term 'extra hazardous' wherever used in this act, to wit: . . . steamboats, tugs, ferries . . ."

"Sec. 27. If any employer shall be adjudicated to be outside the lawful scope of this act, the act shall not apply to him or his workman, . . ."

If our decision in the *Jarvis* case is to remain as a correct exposition of the law in so far as therein discussed, the last quoted paragraph from section 27 of the act seems to render

it quite plain that both appellant and respondent are "outside the lawful scope of this act," that none of the rights of either of them are in the least changed or lessened by its provisions, and that their rights and remedies remain unimpaired as if the act had never become the law of this state. The views expressed in the following decisions are in harmony with our conclusion here reached, though the questions therein considered are not exactly the same as here presented. *Reynolds v. Day*, 79 Wash. 499, 140 Pac. 681, L. R. A. 1916A 432; *Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180, 119 Pac. 554; *Schuede v. Zenith S. S. Co.*, 216 Fed. 566.

There has come to our notice the decisions in *Mathison v. Minneapolis St. R. Co.*, 126 Minn. 286, 148 N. W. 71, L. R. A. 1916D 412; *Lindstrom v. Mutual Steamship Co.*, 132 Minn. 328, 156 N. W. 669, L. R. A. 1916D 935, and *Kennerson v. Thames Towboat Co.*, 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A 436, which are thought to be out of harmony with our own views herein expressed. Those cases, however, deal with workmen's compensation acts which leave it optional with the employer and employee as to whether they will come under and be governed by the provisions of the acts in question. In such cases we see no reason why such an election on the part of the employer and employee might not be held to divest the claimant of the right to resort to admiralty for relief upon the ground of estoppel; as where there is an election to sue in the state court instead of in admiralty, in the absence of a workmen's compensation act. Such, in substance, is the theory upon which Judge Neterer of our Federal district court rendered his decision in the case of *The Fred E. Sander*, 212 Fed. 545, holding that the libelant having applied for and received compensation from the accident fund under our workmen's compensation act, he thereby became precluded from seeking redress in admiralty. The question of the libelant's right to receive compensation from the accident fund, and the question of the duty of the commission in making such award from that fund,

was a matter with which the Federal court was not called upon to concern itself. It was enough for the learned judge of that court to know that the libelant, seeking his remedy in admiralty, had been awarded and accepted compensation from the accident fund under the act.

In *Walker v. Clyde S. S. Co.*, 215 N. Y. 529, 109 N. E. 604, Ann. Cas. 1916B 87, we have a decision in which there are some remarks of the court which may seem opposed to our views herein expressed. In that case, the injured employee was engaged in maritime service such as would have secured to him his remedy in admiralty had he elected to so assert it. He applied to the state commission and was awarded compensation from the accident fund provided for in the workmen's compensation act. His employer, the steamship company, as it apparently had the right to do under the act, caused the question of the claimant's right to compensation from that fund to be removed to the courts for review, with a view of defeating the award made by the commission. The fact of the steamship company having contributed to the accident fund seems to be assumed in the decision. Whether it did so by compulsion or at its own election does not appear in the opinion of the court. The decision may be harmonized with the conclusion we here reach, if we assume that the workmen's compensation act of that state does not compel the employer to contribute to the fund from which the claimant was compensated, but is only elective in that regard. If the employer having such right of election voluntarily contributed to the fund and the employee took compensation therefrom, both would be in substantially the same position as the employee found himself in *The Fred E. Sander* case, 212 Fed. 545. If the decision cannot be harmonized with our views upon this theory, with all due respect for that great court, we would feel constrained to not follow it, in the light of our decision in the *Jarvis* case, which we are not now inclined to recede from.

We have not overlooked the decision of Judge Cushman of our Federal district court in *Stoll v. Pacific Coast S. S. Co.*, 205 Fed. 169, wherein it was held that an action upon the law side of the Federal district court, which could have been maintained in admiralty, for injuries received as the result of the steamship company's negligence could not be maintained; the decision being rested upon the language of section 1 of the act (Id., § 6604-1) above quoted, and apparently regarded by the court as absolutely abolishing the employee's right to maintain such an action in the courts and substituting therefor his right to compensation from the accident fund. The fact that the plaintiff had a right to seek his remedy in admiralty seems not to have been noticed in the case. We think, therefore, that the decision would not be a controlling authority here even if the question were a Federal one, as it manifestly is not, since it has to do, in its last analysis, only with the right to maintain a common law action in the state courts.

Included in the enumeration of extra hazardous works in section 2 (Id., § 6604-2) of the act are "steamboats, tugs, ferries." If our conclusion rendered these words in the act meaningless, it might be argued with some show of reason that we are not correctly construing its provisions. There are, however, a number of inland navigable lakes wholly within the boundaries of this state having no navigable connection whatever with rivers or tide waters constituting navigable waterways to the high seas. It seems to be well settled that the jurisdiction of the state over such inland waters so unconnected with the high seas is exclusive, and that there is no Federal admiralty jurisdiction over such waters. *Commonwealth v. King*, 150 Mass. 221, 22 N. E. 905, 5 L. R. A. 536; *Stapp v. Steamboat Clyde*, 43 Minn. 192, 45 N. W. 430; *United States v. Burlington & Henderson County Ferry Co.*, 21 Fed. 331. It therefore seems plain that the words "steamboats, tugs, ferries" are not rendered meaningless by our construction of the act. We note in this connection that sec-

tion 2 (Id., § 6604-2) of the act, above quoted from, provides that "it is the purpose to embrace all of them [extra hazardous works] which are within the legislative jurisdiction of the state."

It is contended that the trial court had no jurisdiction to render the judgment in favor of the respondent which is here appealed from because it had previously rendered a final judgment of dismissal in appellant's favor upon its motion for judgment notwithstanding the verdict. Upon the return of the verdict, the clerk, by direction of the court, withheld entry of judgment thereon pending appellant's motion for judgment notwithstanding the verdict. Thereafter that motion was argued and decision thereon taken under advisement by the court. Thereafter the trial judge announced in open court, in substance, that he had concluded to grant appellant's motion for judgment notwithstanding the verdict, when it evidently was understood by the court and counsel for both parties that judgment be prepared accordingly; and since the ground upon which the court was inclined to so hold was that respondent had no right of action in the courts because of the passage of our workmen's compensation act, it apparently was then contemplated that judgment of dismissal would be prepared in such form that the question of respondent's right to maintain the action in the light of our workmen's compensation act might be presented to this court upon a short record. The matter was to be postponed until counsel could prepare some such form of judgment. However, at that time the clerk of the court did make a brief minute entry which could be construed as a final judgment of dismissal of the case in harmony with the views then expressed by the court. This entry was made without the knowledge of the court or of counsel for either party as to its contents. Thereafter, counsel for both parties were again before the court for the purpose of having formal judgment entered, when the judge announced that he had reached a different conclusion upon further reflection and had become

of the opinion that the workmen's compensation act did not preclude respondent from maintaining this action, in view of the fact that his injuries resulted while he was in maritime service. Formal judgment was then prepared and entered accordingly, from which this appeal was taken. It was not until after this that the contents of the minute entry made by the clerk were discovered by either counsel or the court. Thereafter, on a proper showing and notice in the form of an order to show cause, the minute entry was set aside and expunged from the record upon the ground that the same had been entered by the clerk "inadvertently and through mischance." It seems plain to us that the showing was sufficient in warranting the court in so concluding and ordering in reference to that entry. It follows that the judgment here appealed from is the only judgment that was actually rendered in the case.

Some other claimed errors are relied upon by counsel for appellant. We think, however, that whatever technical error there may have been in the rulings so questioned, they were wholly without prejudice to the rights of appellant and that they do not call for further notice here. We conclude that the judgment must be affirmed. It is so ordered.

ELLIS, C. J., MAIN, MOUNT, HOLCOMB, and FULLERTON, JJ., concur.

[No. 13518. Department One. January 24, 1917.]

J. C. STOTTS, *Respondent*, v. PUGET SOUND TRACTION, LIGHT & POWER COMPANY, *Appellant*.[1]

SALES—CONDITIONAL SALES—BUYER—RIGHTS AS TO TRESPASSERS—ACTIONS—REAL PARTY IN INTEREST. A vendee in possession under a conditional sales contract may maintain an action for injuries to the property, as the "real party in interest," within the meaning of Rem. Code, § 179, the same as though he were a bailee; especially in view of the defendant's right to bring in additional parties.

ESTOPPEL—SELLER — CONDITIONAL TITLE — APPEARING AS WITNESS FOR PARTY. A vendor in a conditional sales contract who testifies on behalf of the vendee in an action to recover for injuries to the property, waives his right to recover for the damages, if any he had.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action for damages to an auto truck struck by a street car, prejudicial error cannot be predicated upon an instruction that the defendant must entrust the operation of its cars to men of experience and ability, where there was no issue thereon; since the jury would not treat that as an issuable fact.

STREET RAILROADS—COLLISION—DUTIES OF MOTORMAN — INSTRUCTIONS. In an action for injuries to an auto truck, struck by a street car, it is not error to instruct that the motorman must use every reasonable effort and all means at hand to avoid colliding with another vehicle and to have the car under control so that he may stop it promptly, when coupled with other instructions to the effect that he had the right to assume that the auto would get off the track and was not required to stop until the danger was imminent.

APPEAL—REVIEW—VERDICT. A verdict for damages to an auto truck, which allowed apparently unreasonable damages for depreciation, will not be set aside on appeal as excessive where there was evidence to sustain it and no contradictory evidence.

Appeal from a judgment of the superior court for King county, Smith, J., entered November 16, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages. Affirmed.

James B. Howe and *A. J. Falknor*, for appellant.

Spence & Denham, for respondent.

[1]Reported in 162 Pac. 519.

CHADWICK, J.—Plaintiff sues as the owner of an automobile truck which was damaged in a collision with one of defendant's street cars. The jury found that the accident resulted in consequence of the negligence of the driver of the street car. The verdict is sustained by ample testimony.

The first question to be decided is whether plaintiff has a cause of action. He had bargained for the truck, made some payments, and had given his notes for the balance due. The truck was delivered to him under a conditional sales contract. Plaintiff had possession, under the terms of the contract, at the time of the accident. The action was brought under the authority of *Messenger v. Murphy*, 33 Wash. 353, 74 Pac. 480, wherein it is held that one holding under a conditional sales contract can maintain an action for the conversion of personal property.

Defendant insists that the *Messenger* case is a holding consistent with the general rule that one who has possession of personal property may maintain an action in trover or for conversion under the statute, 38 Cyc. 2046, 2047, 2089, 2090, but that it cannot be held that one who is without any element of title other than possession *(Winton Motor Car Co. v. Broadway Auto Co.*, 65 Wash. 650, 118 Pac. 817, 37 L. R. A. [N. S.] 71), can maintain an action for damages suffered on account of the negligence of a third party; contending, also, that to so hold would do violence to Rem. Code, § 179, which provides that: "Every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law;" and §§ 189 and 196, providing for the bringing in of additional parties. It is declared that the rule is as recently announced in *Peterson v. Chess*, 92 Wash. 682, 159 Pac. 894, where we held that the plaintiff, who claimed title under conditional sales contract to the property injured, was not entitled to recover. It is true that the *Messenger* case goes no further than to hold that a holder of personal property under a conditional sales contract can recover in an action for conversion. That case is in accord

with the entire current of authority. When the case of *Peterson v. Chess, supra*, was before the court, the same questions we are now dealing with were considered by the judges, but it occurring that the case might be readily distinguished, we attempted to do so by suggesting the fact that plaintiff's vendor had forfeited the contract and retaken the property. It appearing that the plaintiff had no interest, not even possession or right of possession, we felt no hesitation in passing the *Messenger* case without further discussion. The question is fairly presented in the case at bar and must be decided, for in this case the debt survives and the property is still in the possession of the vendee, the plaintiff.

This court, as previously noted in this opinion, had held that a vendee under a conditional sale has no title, but it does not follow that the law will not define and protect such rights as he may have. To do this, we must first ascertain his real relation to the property. The same question being submitted to the supreme court of Vermont, after a somewhat extended inquiry, it was held:

"Although the vendee may not be strictly a bailee, we think he is properly classed as standing in the position of a bailee, which places the vendor in the position of a bailor. Standing thus, each can maintain all the rights that the law has thus far accorded to them, and their position is fairly well defined." *French v. Osmer*, 67 Vt. 427, 32 Atl. 254.

The right of the vendee, as against third parties, may well be likened to that of a bailee, and we see no reason why the same rules should not apply, especially when we consider the several statutes relied on by defendant.

"The law seems to be well settled that the bailee of personal property may recover compensation for any conversion of or any injury to the article bailed while in his possession . . .

"Where a suit is brought by a bailee against a third person for loss or injury to the subject of the bailment, the former's right to damages is not limited to his special interest in the property, but the general current of authority appears to hold that the bailee is entitled to damages commensurate with

the full value of the property taken or the degree of injury sustained." R. C. L. p. 127, § 49.

See, also, 6 C. J. 1168, § 184.

The theory of the law being that the bailee being bound to restore the property or to answer for its value, the action is maintained for the benefit of the bailor, and bars a subsequent action by him. We think the analogy is complete. While having no element of title, the conditional sales vendee is bound to keep the property secure and to pay its value to the vendor. The quantum of title is the same in the vendor as in the bailor, and the want of title is the same in the vendee as in the bailee. The liability of the trespasser is the same, his only concern being that he shall not be put to the hazard of two recoveries. He is amply protected by the very statutes cited by appellant. Under them, he can bring in the vendor and make him answer to the complaint. Under the code system, every action may be said to be an action on the case. Either party or the court, upon its own motion, has ample power to bring in all available parties.

Moreover, it should not be held that a vendee, under a conditional sale, could not recover under such facts as are disclosed by the record. The reservation of title is for the benefit of the vendor. Like all such reservations, it may be waived. The vendor appeared as a witness in plaintiff's behalf. When he did so, he effectually waived the right to recover for damages to the truck, if any he had. Upon either theory, plaintiff is entitled to maintain his action.

The court instructed the jury that:

"It is the duty of the defendant to operate its cars at all times with reasonable care and caution, *and to entrust the operation of its cars to men of such experience and ability as are able to handle the cars at all times in a prudent and careful manner.*"

The italicized words are criticized, for, as it is asserted, there was no issue tendered or framed as to the experience or ability of the motorman. It is true that there was no issue

and no evidence from which the inexperience or inability of the motorman could be inferred. If delinquent, the motorman was either careless or negligent. Whether the motorman was experienced was referred to only incidentally, and then at the solicitation of counsel for defendant, who questioned him when on the stand as to experience, etc. Although an entirely unnecessary and inopportune statement of the law, the charge of the court was, after all, a declaration of no more than what all men know. We are unwilling to believe that the jury would treat the experience of the motorman as an issuable fact.

The court also instructed the jury as follows:

"It is the duty of the operator of a street car to use every reasonable effort, with all the means at hand, to avoid running into or colliding with another vehicle, and it is the duty of such operator, if he has time so to do, to have the car in such control that he may stop it promptly upon the appearance of danger."

It is complained that this instruction puts too great a burden upon the motorman. Standing alone, the instruction might well be criticized. It were better if the court had embraced within one instruction the rule as we have declared it to be in *Duteau v. Seattle Electric Co.*, 45 Wash. 418, 88 Pac. 755; *Pantages v. Seattle Electric Co.*, 55 Wash. 453, 104 Pac. 629. However, in other instructions, the jury were told that the motorman had a right to assume that the driver of the truck would get off the track, and that he was not required to stop his car until the danger became imminent. As qualified by subsequent instructions, we think the instruction complained of was not prejudicial.

The jury returned a verdict for $810.91—$187.16 for repairs, $423.75 for depreciation, and $200 for replacement of the car during a reasonable time for survey and repairs. The court reduced the finding of $200 for time lost for replacement and repairs to $75, and entered judgment for the balance of the verdict. The item allowed for depreciation is

the only item complained of. While the verdict seems unreasonable, there is testimony to sustain it, and defendant has not called our attention to any contradictory evidence.

The judgment is affirmed.

ELLIS, C. J., MAIN, and MOUNT, JJ., concur.

[No. 13582. Department Two. January 24, 1917.]

EMIL ZECH, *Respondent*, v. WILLIAM H. BELL, *as Bell Decorating Company, et al., Appellants.*[1]

JOINT ADVENTURES—NATURE—"NET PROFITS"—UNEQUAL CONTRIBUTION. An agreement to share equally the "net profits" on a contract for finishing, painting, and decorating a building, constitutes a joint adventure and not a partnership, requiring an equal division of property without regard to any inequality in contribution or interest on money advanced.

SAME—"NET PROFITS"—OVERHEAD EXPENSE—CUSTOM — EVIDENCE. Under an agreement to share the "net profits" of a contract for finishing, painting, and decorating a building, "overhead" expense cannot be allowed on the testimony by one party that it "customarily" amounted to eighteen per cent in his business, in the absence of evidence that there was a general or trade custom to that effect, or that the other party was informed of such overhead expense at the time of making the contract of joint adventure.

SAME—CONTRACT — BALANCE — EVIDENCE — SUFFICIENCY. That a profit-sharing contract was made and a balance due to plaintiff appears from admissions of the defendant in a letter referring to the probable net profits, stating the sum plaintiff had had in salary and profits, and to the effect that defendant would soon compute and pay the balance due him.

Appeal from a judgment of the superior court for King county, Ronald, J., entered October 14, 1915, in favor of the plaintiff, upon findings of the court and the report of a referee, in an action for an accounting. Affirmed.

John W. Roberts and *George L. Spirk*, for appellants.

George L. Palmer and *Beechler & Batchelor*, for respondent.

[1]Reported in 162 Pac. 363.

HOLCOMB, J.—Respondent had judgment upon a second cause of action for an accounting and balance in his favor against appellants in the sum of $729.80, the matter involved in the first cause of action not being in controversy here. The substance of the allegations of the complaint upon which the accounting and judgment were demanded is that, on about April 10, 1914, the defendant William H. Bell entered into an oral contract with respondent by the terms of which it was mutually agreed that, in consideration of the services and labor of respondent to be performed upon the work of finishing, painting, frescoing and decorating a certain building in the city of Seattle known as the L. C. Smith forty-two story building, for which work the defendant Bell had the contract with the general contractors of the building, the net profits, to be received upon such work or job after ascertaining the same by deducting the necessary and actual expenses of the work from the contract price to be received by the defendant, were to be equally divided between them; that thereupon, defendant Bell having secured the work and contract from the general contractors, respondent, in compliance with the terms of the oral agreement, entered upon the work of decorating the building, and continued to devote his entire time and attention thereto until the same was completed and accepted by the general contractors, architects, and owner of the building; that, during the continuance of the work, the defendant William H. Bell kept, and at the time of the commencement of suit had, all the books, papers and memoranda relating to the work and job, and that he collected all sums due thereon for the work, the respondent drawing and receiving only a small sum per week out of the moneys so due, known as the drawing account, upon the profits due the respondent; that the defendant Bell collected and appropriated to his own use, outside of the expenses of the job, and except the sum of $390 drawn in weekly payments by respondent, and except the further sum of $700 paid to the respondent, the entire sum due from the general

contractors on the building; that the respondent, by reason of the fact that defendant Bell had in his possession the books and accounts and refused to render a statement thereof, was unable to furnish a complete statement of the profits upon the job and the exact amount due to respondent under his agreement, but alleged that the net profits upon the job amounted to at least the sum of $3,550, and that there was at least the sum of $900 due respondent as his share of the net profits; that the true amount due respondent could be ascertained only by a complete accounting between the parties; that the plaintiff had demanded of the defendants a complete accounting, which the defendants at all times refused. Judgment was prayed accordingly.

Upon issues being joined by answer to the complaint and reply to the affirmative answers, a partial trial was had, the court entering upon the trial of the matter to determine the question of whether or not the parties sustained such relations and such conditions existed as required an accounting. Evidence upon that question was received and the court, determining that such relations existed and that an accounting was necessary, ordered a reference and appointed a referee, and the referee thereupon qualified and proceeded to receive evidence upon the accounting. On the conclusion of the evidence, the referee made his report and findings of fact and conclusions of law in writing and filed the same, and the court entered judgment thereon.

By his report and findings, the referee found that the total receipts received by Bell under his contract on the Smith building were $12,230; that he expended the following sums on the contract: Materials, $3,203.06; labor, $5,195.68; miscellaneous expenditures, $191.63; interest paid on loans, $43.56; making a total of $8,633.93, expenses. The referee further found that there was chargeable against the receipts for the work on the Smith building, in case the court held that a partnership agreement existed between respondent and Bell, eighteen per cent of the cost of doing the work, or $1,546.20,

which item is generally spoken of in business matters and accounting as "overhead," and that if a partnership agreement existed between respondent and Bell, the respondent has been overpaid in the sum of $65.10; that if the agreement was one of joint adventure, then the overhead expenses could not be allowed, and that Bell would then be indebted to respondent in the sum of $729.80. Upon this report and after further argument, the court found that the transaction between these parties constituted a joint adventure and not a general partnership, and that Bell was not entitled to deduct eighteen per cent overhead, nor $43.56 interest, and that respondent was entitled to a balance of $729.80.

Appellants excepted to the report of the referee, to all portions of the report referring to a joint adventure, and to the holding of the court that overhead expenses and interest were not allowable if the arrangement was a joint adventure, and that it was a joint venture. Motions for judgment notwithstanding the decision of the court and for new trial were unsuccessfully made by appellants and each of them.

Upon this appeal much time is devoted to a discussion of the question of whether the arrangement between the parties was a partnership or a joint adventure, and it is contended by appellants that the respondent based his second cause of action upon a partnership; that the court determined the matter, at the time the reference was ordered and the referee appointed, upon the theory of a partnership, and thus prejudiced the rights of the appellants.

It seems to us that brief consideration need be given to this question. We cannot see how appellants were prejudiced upon that matter, although both the trial judge and respondent loosely and in common parlance alluded to the parties as "partners," and to a "partnership," since the complaint, as to the second cause of action, clearly alleged only a profit-sharing venture in a single transaction—the contract for the finishing, painting, frescoing and decorating of the L. C. Smith building—and the proofs sustained that contract as

alleged. A joint adventure is an enterprise undertaken by several persons jointly. 23 Cyc. 452.

"One distinction [between a partnership and a joint adventure] lies in the fact that while a partnership is ordinarily formed for the transaction of a general business of a particular kind, a joint adventure relates to a single transaction, although the latter may comprehend a business to be continued for a period of years. . . . The principal distinction, however, is that in most jurisdictions where any [distinction] is regarded as existing, one party may sue the other at law for a breach of the contract or a share of the profits or losses, or a contribution for advances made in excess of his share; but this right will not preclude a suit in equity for an accounting." 23 Cyc. 453.

As to the rights of the party contributing the capital, he

"is entitled to reimbursement for all expenses. . . . But he cannot charge against the fund any part of the expenses of negotiating a loan to be used in the adventure, or interest on such loan, or on advances made by him." 23 Cyc. 457.

As to joint adventures,

"In the absence of express agreement the law implies an equal division of profits, without regard to any inequality of contribution." 23 Cyc. 459.

Appellants admit that the ascertaining of the net profits even in a joint adventure contract is not, under such contract as the respondent here claimed, any different from ascertaining the net profits in a partnership, because the term "net profits" has a well defined meaning whether it be in a partnership or in a joint adventure; that the oral contract claimed by the respondent was no different as to ascertainment of the net profits from any partnership, and it is argued from that assumption that the overhead expense, which they claimed was eighteen per cent, should in any event be allowed and deducted. The contest here thus revolves principally upon the question of what are in fact the net profits of the adventure. The appellant Bell contended and testified that his overhead expense in performing such

a contract as he had upon the Smith building customarily amounted to eighteen per cent. But his testimony that it customarily amounted in his business to a certain percentage does not establish a general custom to that effect, nor a particular custom of that trade, and without proof of a general trade custom or, in the absence of that, of a private business custom brought to the knowledge of the other party to the joint adventure, it could not be sustained as a just allowance. There was no evidence that it was a general trade custom or a particular custom of this particular trade. Nor was there any evidence to the effect that, at the making of the contract of joint adventure, respondent was informed that the usual overhead expense of carrying such contract was eighteen per cent or any other per cent. The evidence in fact is, as shown by the record, that the overhead expense varies and appellants kept no account of what particular expenses, which are commonly included in and designated as overhead expenses, occurred in the carrying on of this particular contract. If appellants should now be permitted to charge against this joint adventure a proportionate share of such expenses in doing their entire general business, they could charge respondent with much more than his proportionate share on this particular transaction. *Bane v. Dow*, 80 Wash. 631, 142 Pac. 28. Manifestly they should have shown exactly what that proportionate share was, or the particular items of business expense which entered into and became a part of this particular contract. 30 Cyc. 742. This they failed to do.

As to the question generally, whether it was a profit-sharing contract, and as to whether anything was due under it to respondent, appellant Bell clearly concluded the matter by his letter to respondent of September 29, 1914, wherein, among other things, he said that, although he did not have all the accounts footed up accurately, he had roughly computed the probable net profits without extra work done on the partitions, and that the figures totaled approximately

$3,100; that respondent had had in salary and profits on that job $1,090, and this amount with some moneys collected on other work by respondent would bring what respondent had received close up to the amount due him; that there was, however, something due him, and that he would clean it all up just as soon as he could get that work off his hands. There was testimony also of other admissions, and there could be no finding other than that it was a profit-sharing contract, that there was a balance due respondent, and that the balance due was correctly arrived at by the referee and by the court. After a careful examination of the record, we are of the opinion that no other result could have been arrived at than the judgment entered by the lower court.

The motions for judgment notwithstanding the decision and for a new trial were without merit and were properly denied. There is no error in the record, and the judgment is affirmed.

Morris, Mount, Fullerton, and Parker, JJ., concur.

[No. 13505. Department Two. January 24, 1917.]

THE STATE OF WASHINGTON, *Respondent*, v. HARRY R. KNOWLES, *Appellant*.[1]

EXTRADITION—INTERSTATE — RIGHTS OF ACCUSED — TRIAL — SAME CHARGE. It must be assumed that accused was tried on the charge on which he was extradited, where he was extradited on a charge of grand larceny pending before a committing magistrate, and waived examination and was bound over and later charged in a new information with grand larceny jointly with another, and separately tried and convicted, it not being shown that the conviction was based upon other facts than those originally charged.

EMBEZZLEMENT—EVIDENCE — ADMISSIBILITY — SUFFICIENCY. In a prosecution for embezzling the moneys of a lodge, in which there was evidence that a bank account was an account kept by the accused of moneys belonging to the lodge, the statement of the bank account is competent to show the condition of the fund, and it was for the jury to determine whether the fund belonged to the lodge.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered April 24, 1915, upon a trial and conviction of grand larceny. Affirmed.

E. C. Dailey, for appellant.

O. T. Webb, *Clifford Newton*, and *H. D. Cooley*, for respondent.

MOUNT, J.—This appeal is from a conviction on a charge of grand larceny. The appellant was charged jointly with another, and tried separately.

The first point argued by the appellant is that the trial court had no jurisdiction, because the appellant was extradited from the state of Arkansas upon one offense and tried in this state on another. At the time the question was raised, appellant made an affidavit to the effect, that he was extradited from the state of Arkansas to the state of Washington to answer to a charge of grand larceny, which had been filed in the justice court in Everett precinct, in Sno-

[1]Reported in 162 Pac. 518.

homish county; that the affiant, after his extradition, waived examination before the justice court, and was bound over to the superior court of the state of Washington to answer to the charge of grand larceny; that thereafter another charge was filed against appellant, charging him, together with another person, with the crime of grand larceny; that the first charge was dismissed; that he was not given an opportunity, after the dismissal of the first charge, to return to the state of Arkansas.

It is contended by the appellant that, under the law, he cannot be tried for any other offense than the particular offense upon which he was extradited. No authorities are cited by the appellant to that effect. In *Harland v. Territory*, 3 Wash. Terr. 131, 13 Pac. 453, it was held that a person could be tried for a crime which was slightly different from the one upon which he was extradited. In *State v. Lindgrind*, 33 Wash. 440, 74 Pac. 565, it was conceded that the appellant could only be tried for the crime for which he was extradited, and the court did not, therefore, consider the question. The rule is stated at 19 Cyc., page 97, as follows:

"Although there has long been a conflict in the decisions of courts of the several states, it is now generally accepted that a fugitive from justice, surrendered by one state upon the demand of another, is not protected from prosecution for offenses other than that for which he was surrendered but may be tried for any crimes committed in the demanding state either before or after extradition."

A number of cases are there cited to sustain the rule. It is not necessary in this case, we think, to determine what the rule is, for it is apparent from the affidavit of the appellant, filed in the case, that he was extradited from the state of Arkansas for the crime of grand larceny, which was then pending before a committing magistrate. When he was brought here, he waived examination before the committing magistrate, and was bound over to the superior court. In the superior court, it appears that a new information was

filed, charging the same offense against the appellant and another person, jointly. The appellant was tried separately, and convicted. It does not appear that the information upon which appellant was tried was based upon other facts than the original charge. We must assume, then, that the facts were the same. We think it is plain, therefore, that the appellant was tried for the offense upon which he was extradited, namely, grand larceny.

It is next objected that the court erred in admitting evidence of a bank account which the appellant carried in a bank in Everett. There was evidence to the effect that this bank account was really an account kept by the appellant of moneys belonging to the Eagles' Lodge, which money is alleged to have been appropriated by the appellant. The statement of the bank account was clearly competent to show the condition of that fund, and it was for the jury to determine whether the fund was really property of the appellant or of the lodge of which he was an officer.

It is next contended that there was no evidence sufficient to warrant the conviction of the appellant. Without reviewing the facts upon that question, that was clearly a question for the jury. It is not pointed out in what the evidence was deficient, except it is stated that it was not proven that the appellant received any money belonging to the lodge. There was ample evidence of that fact, and whether the appellant was guilty upon all the facts was a question for the jury.

We find no error in the record, and the judgment is therefore affirmed.

MORRIS, PARKER, HOLCOMB, and FULLERTON, JJ., concur.

[No. 13498. Department Two. January 26, 1917.]

C. H. BARTLETT *et al.*, *Respondents*, v. J. B. LANPHIER *et al.*, *Appellants*.[1]

MUNICIPAL CORPORATIONS—USE OF STREETS — AUTOMOBILES — LICENSE—STATUTES—PROVISO—CONSTRUCTION. A proviso attached to an act not being a part of the enacting words, but a restraint upon or exception to some part of it, the proviso to the act relating to permits for others than street railways etc., for the operation of motor vehicles for hire in "a city of the first class," Rem. Code, § 5562-37, to the effect that the act shall include interurban railways transporting passengers for hire in any motor propelled vehicle except street cars "along any street, road or highway in the state," does not have the effect of enlarging the act to cover motor vehicles operated by private individuals for hire on highways outside the limits of cities of the first class.

SAME—USE OF STREETS—AUTOMOBILES—LICENSES—BONDS—LIABILITY—STATUTES. Under Rem. Code, §§ 5562-37, 5562-38, requiring a permit and bond for the operation of motor vehicles for hire in cities of the first class, liability on their bond for injuries received due to negligent operation is limited to injuries which occur within the limits of such city, in view of the dominant purpose of the act to regulate only operation in cities of the first class and to require no permits for cars operating outside of such limits.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered December 2, 1915, upon findings in favor of the plaintiffs, in an action for damages, tried to the court. Affirmed in part and reversed in part.

Geo. McKay, *Henry S. Noon*, and *Frank S. Carroll*, for appellants.

Rickabaugh & McElroy, for respondents.

PARKER, J.—The plaintiffs seek recovery of damages alleged to have resulted to them from the negligent operation of an automobile belonging to the defendant J. B. Lanphier by his servant; and also seek recovery upon the bond executed by the defendants Lanphier, as principal, and Pacific Coast

[1]Reported in 162 Pac. 532.

Casualty Company, as surety, which bond was filed in the office of the secretary of state in the securing by Lanphier of a permit to operate his automobile for hire in the city of Tacoma. Trial in the superior court without a jury resulted in findings and judgment in favor of the plaintiffs against both defendants, from which they have appealed.

In June, 1915, the secretary of state issued to Lanphier a permit to operate his automobile by the carrying of passengers for hire in the city of Tacoma; Lanphier, at the same time, filing the bond here sued upon in the office of the secretary of state; all of which was done in compliance with chapter 57, Laws of 1915, p. 227 (Rem. Code, § 5562-37), relating to permits to so operate motor vehicles in cities of the first class. On the 10th day of July following, respondents were damaged by the negligent act of Lanphier's servant while driving his automobile upon a country road in Pierce county outside the corporate limits of the city of Tacoma. In view of our conclusion as to the rights of the parties, we need notice no other facts.

While both Lanphier and the casualty company have appealed, we do not find in the briefs any contention against the plaintiffs' right to recover against Lanphier; the contention here being only that the plaintiffs cannot recover upon the bond, which, as we view it, has only to do with the plaintiffs' right to recover against the casualty company. In this behalf it is argued that the bond does not secure compensation to persons injured or otherwise damaged by the operation of an automobile for which such a permit is issued, when operated upon country roads outside the limits of the city in which it is so permitted to be operated, and that, therefore, there can be no recovery against the casualty company in this case. The problem thus presented finds its answer in the proper construction of the language of the statute providing for the issuance of the permit and the giving of the bond, which, so far as we need here notice such provisions, reads as follows:

"Section 1. It shall be unlawful for any person, firm or corporation, other than a steam, street or interurban railway company to engage in or carry on the business of carrying or transporting passengers for hire in any motor propelled vehicle along any public street, road or highway, within the corporate limits of any city of the first class, without having first obtained a permit so to do as hereinafter provided: *Provided*, that any street or interurban railway or other transportation company engaging in the business of transporting passengers for hire in any motor propelled vehicle except street cars along any public street, road or highway in this state, shall come under the provisions of this act: . . .

"Section 2. Every person, firm or corporation other than a steam, street or interurban railway company, desiring to engage in the business of carrying or transporting passengers for hire in any motor propelled vehicle over or along any public street, road or highway in any city of the first class and every street or interurban railway or other transportation company desiring to engage in the business of transporting passengers for hire in any motor propelled vehicle except street cars, shall apply to the secretary of state for a permit so to do, and such applicant for each motor vehicle intended to be so operated shall deposit and keep on file with the secretary of state a bond running to the state of Washington in the penal sum of twenty-five hundred dollars, with good and sufficient surety company licensed to do business in this state as surety to be approved by the secretary of state, conditioned for the faithful compliance by the principal of said bond with the provisions of this act and to pay all damages which may be sustained by any person injured by reason of any careless, negligent or unlawful act on the part of said principal, his agents or employes in the conduct of said business or in the operation of any motor propelled vehicle used in transporting passengers for hire over or along any public street, road or highway, and shall pay to the secretary of state a fee of five dollars and thereupon such license shall be issued to the applicant.

"Section 3. Every person injured by any careless, negligent or unlawful act of any person, firm or corporation receiving a permit under the provisions of this act, or his, their, or its agents, or employes in conducting or carrying on said business or in operating any motor propelled vehicle used for the

carrying and transporting of passengers over and along any public street, road or highway, and his heirs, executors and administrators shall have a cause of action against the principal and surety upon the bond provided for in the preceding section for all damages sustained and in any such action the full amount of damages sustained may be recovered against the principal, but the recovery against the surety shall be limited to the amount of the bond . . ." Chapter 57, Laws of 1915, p. 227 (Rem. Code, §§ 5562-37 to 5562-39).

If one reads these sections without having in mind the dominant purpose of the act, which manifestly is to prevent the operation of motor vehicles by carrying passengers for hire *in cities of the first class* without a permit so to do, and to secure compensation to those negligently injured by such operation *in cities of the first class*, there will be suggested to the mind of the reader many uncertainties and much ambiguity in the meaning of the language used. But having this evident dominant purpose of the act in view, we think it must be held that no permit for so operating motor vehicles outside the corporate limits of cities of the first class is required, and that the bond required as a condition precedent to the issuance of such permit is not to secure compensation for injuries other than such as occur within the corporate limits of such cities. In other words, that neither the permit nor the bond has anything to do with the operation of motor vehicles outside the corporate limits of such cities.

Looking alone to the portion of section one preceding the proviso, no doubt is suggested as to permits being required only for the operation of motor vehicles in cities of the first class. It is argued that the proviso in this section broadens this evident limited meaning of the language preceding in the body of the section, because there is in the proviso the words "any public street, road or highway in this state." Viewed superficially, this may seem a plausible argument, but its force is broken when we are reminded that the purpose of a proviso is not to broaden the meaning of language found in the main body of the act, but rather to limit the meaning of

such language or except from its operation some specified objects or things. In *Laidlaw v. Portland, Vancouver etc. R. Co.*, 42 Wash. 292, 84 Pac. 855, Judge Hadley, speaking for the court, said:

"It is a rule of construction that a proviso often constitutes an exception to the enacting words of the section. 'Provisos and exceptions are similar; intended to restrain the enacting clause; to except something which would otherwise be within it, or in some manner to modify it.' Sutherland, Stat. Constr., § 222. See, also, Black, Interpretation of Laws, 270. In *In the Matter of George B. Webb*, 24 How. Prac. 247, the court said:

" 'The office of a proviso is not to enlarge or extend the act or the section of which it is a part, but rather to put a limitation and a restraint upon the language which the lawmaker has employed.' "

In *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. 869, 102 Pac. 766, Judge Chadwick, speaking for the court upon this same subject, said:

"In the construction of statutes, courts look first to the intent of the act, and if the words employed in the declaring part of the statute be plain, unambiguous, and well understood according to their natural and ordinary sense and meaning, the statute itself furnishes a rule of construction beyond which a court cannot go. A proviso attached to a statute is not a part of, but a restraint upon, an exception to, or a modification of some word or phrase of an act. Sutherland, Stat. Constr, 222; Black, Interpretation of Laws, 270; *The Matter of Webb*, 24 How. Pr. 247. In other words, a proviso or an exception to a general statute involving no uncertainty and doubt cannot be held, nor can words be selected therefrom, to add to the declaration of the subject-matter expressed in the body of the act."

We are quite clear, in any event, that such is the meaning of section one, in so far as it has to do with the requiring of a permit for the operation of a motor vehicle by Lanphier, he not being a railway company. We are not here concerned with the question of requiring a permit for the operation of motor vehicles by railway companies in cities of the first class.

Looking to the language of sections two and three, apart from the evident dominant purpose of the act, there can be found therein suggestions of a possible broader meaning touching the purpose of the bond, but we cannot think that the legislature intended to require the bond for any other purpose than to secure compensation for injuries occurring in cities of the first class from the negligent operation of motor vehicles therein under such permits. It would be little short of absurd to have compensation for injuries occurring outside cities of the first class by negligent operation of a motor vehicle which happened to be one permitted under this law to be operated in such a city secured by bond, and at the same time to have no such security required of owners of motor vehicles operated entirely outside such cities, yet such would be the logical result of the contention here made in respondents' behalf. We think the legislature has not in this act evidenced any such intent. The equal privileges and immunities guaranty of section twelve, article one of our constitution strongly suggests this as the proper construction of the act.

The judgment is affirmed as against appellant J. B. Lanphier, and is reversed in so far as it is against the Pacific Coast Casualty Company.

MORRIS, MOUNT, and FULLERTON, JJ., concur.

[No. 13503. Department Two. January 26, 1917.]

N. E. TOLER, *Respondent*, v. NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*.[1]

APPEAL—REVIEW—PRESUMPTION—EXCLUSION OF EVIDENCE. Where an attempt to identify an exhibit failed and, upon objection, it was excluded and not given to the jury as evidence, it will be presumed that the jury did not consider it for any purpose.

MASTER AND SERVANT—APPLIANCES—NEGLIGENCE—NECESSITY—RES IPSA LOQUITUR—BURDEN OF PROOF. As between master and servant, proof of the breaking of the drawbar pin on a locomotive coupling without any known cause does not impute a defective condition due to the negligence of the master, upon the principle of *res ipsa loquitur*, but the burden is upon the servant to prove the master's negligence unless the circumstances were so unusual or so under the control of the company that the accident could not well have happened except through negligence on the part of the company.

SAME—APPLIANCES—DEFECTS — RES IPSA LOQUITUR — EVIDENCE—SUFFICIENCY. In such a case the principle of *res ipsa loquitur* does not apply, and the evidence is insufficient to sustain a recovery in favor of a fireman on a switch engine who was tripped and fell when the drawbar pin coupling the tender to the engine jumped up through the floor of the tender, where it appears that such pins must have some play and ordinarily jump up and fall back into place, that the pin in question had worked properly up to one-half hour before the accident when it had twice jumped up and had been driven back with force, indicating a defective condition in the pin or socket, that no one had had previous notice of the defect and there was no want of proper inspection; since there was no proof that the condition could have been discovered by inspection, and it may have simply jumped up at the instant of the accident in the ordinary way without any negligence attributable to the company.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered January 27, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a locomotive fireman. Reversed.

[1]Reported in 162 Pac. 538.

C. H. Winders, for appellant.

Govnor Teats, *Leo Teats*, and *Ralph Teats*, for respondent.

HOLCOMB, J.—The evidence in support of respondent's case, brought under the Federal employers' liability act, was challenged, both on the close of his case and on the whole case and after verdict and judgment, and is here assailed as wholly failing to establish any legal negligence on the part of appellant to sustain the verdict and judgment, upon which grounds the principal errors are assigned.

Respondent alleged and claimed that, while in the employ of appellant as a locomotive fireman on a yard or switch engine at Everett, he was injured while engaged in interstate commerce. He contended that the drawbar pin beneath the engine and the tender was so out of repair that it worked up through the floor of the tender, making it dangerous for the fireman while stoking the boiler or doing other work required of the fireman, in that the fireman was liable to trip over the same while in the performance of his duties; all of which the defendant knew, or by the exercise of reasonable care on its part should have known, before directing and ordering the plaintiff to fire the same and before ordering and directing the plaintiff to run the same out over different tracks in its terminals, and the plantiff did not know, at the time of taking the engine or at all until about the time of the accident and injury to him, of the defective condition of the pin. The alleged injury occurred on February 7, 1915. Respondent alleged that, on the day previous, the pin holding the drawbar to the tender of the engine was out of repair so that it worked up, and that, on that day, he reported that fact to the engineer, but the engineer negligently failed to report it. There was no evidence, however, tending to support this last allegation of notice to the engineer and failure to report, and the jury were correctly instructed to disregard the same.

Respondent asserted that, at about the hour of three o'clock p. m., the drawbar pin, being defective and out of repair as

before stated, worked up through the floor of the tender a distance of about three inches; that thereupon he drove the pin down into place with his pick, and again in a few minutes the pin worked up through the floor and he drove it down hard; that, at that time, it required very hard blows from the pick to drive it into place, and he thought and believed that it would not work up again, and proceeded with his work on the engine; that, at about the hour of 3:30 p. m., the engine running in the course of the work, while he was in a position with his back toward the pin, shaking the grates on the engine with a wrench and being in a position where he could not see and watch the pin, and without any knowledge on his part, the pin suddenly worked up through the floor again, by reason of its defective condition, and he tripped over the same, throwing him with great force against the side of the tender and maiming and injuring him for life, as was more fully set out in detail.

Under these allegations and proofs, there was no evidence on the part of either the respondent or the appellant that either of them had any notice prior to the afternoon in question that the pin was defective and out of repair.

The following facts appeared, or might reasonably be inferred, from the evidence, in the light of which the questions as to liability must be determined: The particular engine was No. 924 of the appellant, and it was shown that respondent had not worked upon this engine during the previous thirty days. There was evidence that he went to work on this engine in the morning, and during the forenoon of the day of the accident several trips were made in hauling and switching cars, and in every trip the engine and cars were handled with care, nothing being done that would produce a defective drawbar pin. There was also evidence that the drawbar pin, when in a reasonably good condition, might jump out of its socket a few inches, but would of its own weight immediately drop down and remain in place; that when a drawbar pin jumps up and stays above the shoveling

plate, out of position, there is something defective in the drawbar pin or appliance, and especially so when it requires severe hammering to drive it down in place. There was also evidence that, on the following day, appellant removed the pin. The evidence of the appellant's engineer who assisted in removing it, and of another fireman, was that the pin was not bent, but that it was bright on one side, and that it was exceedingly difficult to remove the pin.

There was a question of the competency and effect upon the jury of certain evidence called plaintiff's identification B, which was a drawbar pin brought into court by respondent and which he attempted to identify by description and comparison with the pin which caused the alleged trouble. This pin was obtained from the roundhouse of appellant about three months before the trial. Respondent could not identify it as the pin in question, and only made attempts to identify it by comparison as looking like the pin which caused the trouble after it had been battered by hammering upon the head by the respondent. Upon objection by appellant, the evidence was rejected. This we think was proper, and we must presume that the jury did not consider it as evidence for any purpose, having been rejected by the court and not having been submitted to them as real evidence. There was, consequently, no error to the prejudice of appellant. The pin in question was, therefore, not in evidence. There was no testimony that the identical pin had in fact become bent, worn, or otherwise defective, unless such inference should be drawn from the fact that, while the engine was running, it jumped up and protruded three, four, or five inches, twice to respondent's knowledge, and had to be driven down each time, the last time with great force; and the further fact that next day, after respondent claimed that it had caused the injury, appellant caused it to be removed. The pin is twenty to twenty-two inches long and weighs thirty or forty pounds.

The engine and tender are connected by a drawbar about three and one-half feet long which fits into a large casting in the tender. These castings are about twenty inches thick, with holes through the center in which the draw pins are placed, passing also through a hole in the end of the drawbar, in this way attaching the engine and tender together. The pin which fits in the engine casting is called the engine pin. The pin which fits into the casting of the tender is called the tender pin. The pin which is alleged to have caused this trouble was the tender pin. The heads of the pins are beneath the shoveling plate, a sheet of iron extending across the front opening and platform of the tender upon which the coal from the tender is brought down to be shoveled into the fire box. There are holes in the plate which permit the heads of the pins to drop down through to the casting. The pins are made of such dimensions as to drop down through the holes in the casting. If the head of the pin projects above the surface of the shoveling plate it interferes with the shoveling of coal and must be driven down into its place. It is intended that there shall be a slight play in the working of the pin in the hole of the casting so as not to cramp the engine and tender when going around curves or over rough track having high and low joints. The pins will become bent by slamming or throwing a train of cars violently back and forth. In going around curves or over rough track and uneven joints, the pins will work up and often do; but there was testimony that, if the pin was in perfect condition after having worked up, it would drop back, but that if the pin was defective or the hole in which it rests was defective, it might stay up or not drop down readily; that, if after having worked up, the pin did not drop back readily, that would indicate that either the pin or the hole in the bar was defective; that the defect might be either a shoulder becoming worn at the top or a pin being bent.

The engineer and the fireman (respondent) were both experienced men. On the day in question, they worked in the

forenoon over several miles of yards between the roundhouse in Everett and the stations of Lowell, Ebey Junction, Canyon Mill, and other places. During all that time they handled the cars with care, not slamming them or throwing them violently back and forth. There was no evidence on the part of respondent of any failure on the part of appellant to properly inspect the engine and its appliances, and there was uncontradicted evidence on the part of appellant to the effect that a thorough inspection of the entire engine and appliances was made every three months, and oftener if required, that the engineer was required to make reports of any defects upon written blanks furnished for that purpose, and that the rules of the interstate commerce commission also required such reports. If there existed any defect in any appliance handled by the fireman it was his duty to report it at the first opportunity to the engineer, who reported it. The testimony of the engineer was uncontradicted to the effect that he had no notice of the defective working of the pin in question on the day in question or for several days prior thereto; that he made no report of any such defective condition; that the first he knew of the alleged defect of the pin was the next day after the accident; that, upon such information, the pin was removed and another inserted.

Upon this presentation of the case, as to the question of negligence, appellant contends that the facts shown are merely these: That an experienced engineer and fireman took out a switch engine, worked with that engine over various tracks, handled with care various kinds of cars, and loaded and unloaded from eight o'clock in the morning until twelve at noon; that, after two o'clock, a train of cars was segregated on various tracks with no suggestion of trouble; that it is necessary in connecting a switch engine and tender that there shall be some play through the opening in the pocket where the drawbar fits into the casting on the tender; that it is necessary that a heavy pin go through the hole in the bottom of the tender; that this pin must have some play, and

that in the ordinary operation of either a switch or a road engine, or more particularly a switch engine, by reason of this play, the pin will work and wear a little so that it may jump up; that it will ordinarily fall down, but that at times it becomes stuck and has to be driven down; that such condition arises in the ordinary operation and cannot be prevented with the utmost care in operation, and that, on the day the respondent claimed he was hurt, the condition ordinarily incident to the operation of the engine arose in the afternoon after certain cars had been switched; that there is no evidence whatever that the appellant had failed to inspect, or had any knowledge or notice, or should have known, that this pin was not in proper condition on the morning of the accident, or at any time up to the time that the accident happened; that the only inference to be drawn therefrom is that the pin was not in defective condition up to that time; that the legal inference to be drawn, therefore, is that the appellant failed in nothing in its duty toward respondent, its employee, and that respondent failed to establish any liability against appellant.

Respondent contends that, under these circumstances, the rule of *res ipsa loquitur* applies, and that the jury were warranted in finding, as they must have found, that the pin was bent before respondent went to work on the engine on the day in question, and that, through the defective condition of the pin, he was injured; citing *La Bee v. Sultan Logging Co.*, 47 Wash. 57, 91 Pac. 560, 20 L. R. A. (N. S.) 405.

The disposition of this case upon that rule is a very troublesome question and is not so easy as respondent asserts. It is true that the rule of law is that the employer is under the duty to exercise ordinary care to supply machinery and appliances reasonably safe and suitable for the use of the employee, and in case of his failure so to do, unless the employee has waived his right after due notice of defective appliances and machinery, or has, upon due knowledge, assumed the risk, the employer is, of course, liable for any such

dereliction in duty; and if, as in the *La Bee* case, *supra*, an appliance had been furnished for use by the workman for a particular purpose and in a particular way, and the workman proceeded to use it for the contemplated purpose and in a proper manner without any want of care, and that appliance unexpectedly and without any known cause gave way or broke, it would be imputable to a defective condition, and upon proof of such accident and of such facts, it is a case of *res ipsa loquitur*, a *prima facie* case is established, and the burden is upon the employer to explain away, if possible, his presumed negligence.

Had the fireman been a passenger, in the case of an unexpected accident and injury, he would have had the benefit of a presumption of negligence which it would have been the duty of the company to rebut; but with an employee there is no such presumption, and he must, except under certain circumstances recognized in this state as exceptions, prove affirmatively the fact of negligence, and that it is negligence of such a kind as violates the duty of an employer to an employee. *Erie & W. V. R. Co. v. Smith*, 125 Pa. St. 259, 17 Atl. 443, 11 Am. St. 895; *Mensch v. Pennsylvania R. Co.*, 150 Pa. St. 598, 25 Atl. 31, 17 L. R. A. 450.

The employer is not an insurer of the safety of the employee. In the case of an employee against his employer for damages for personal injuries for failing in the performance of duty, the mere fact of the injury raises no such presumption of negligence on the part of the employer as in the case of a passenger against a common carrier, and the burden of proving negligence rests upon the plaintiff. *Lewinn v. Murphy*, 63 Wash. 356, 115 Pac. 740, Ann. Cas. 1912D 433.

"The true rule would seem to be that when the injury and circumstances attending it are so unusual and of such a nature that it could not well have happened without the company being negligent, or when it is caused by something connected with the equipment or operation of the road, over which the company has entire control, . . . a presumption of neg-

ligence on the part of the company usually arises from proof of such facts." 4 Elliott, Railroads, § 1644.

See, also, *Allen v. Northern Pac. R. Co.*, 35 Wash. 221, 77 Pac. 204, 66 L. R. A. 804; *Firebaugh v. Seattle Electric Co.*, 40 Wash. 658, 82 Pac. 995, 111 Am. St. 990, 2 L. R. A. (N. S.) 836.

"The phrase *res ipsa loquitur*, as applied to negligence cases, is used to give expression to the idea that, when an accident is shown to be of such a character as, in the light of ordinary experience, is inexplicable except as the result of negligence, then negligence will be presumed." *De Yoe v. Seattle Electric Co.*, 53 Wash. 588, 102 Pac. 446, 104 Pac. 647, 1133.

In the *Lewinn v. Murphy* case, *supra*, we said:

"Following the liberal rule adopted by the court in personal injury cases, we did, in the case of *LaBee v. Sultan Logging Co.*, 47 Wash. 57, . . . apply this doctrine to the relation of master and servant, and in doing so, concededly went beyond the weight of authority; . . . We gave as our reasoning in that case that the facts shown eliminated blame on the part of the injured servant or his fellow servants, when the injury was caused by the breaking of a cable which had been given the servant by the master for a particular use, and which at the time of the breaking was being used in the manner directed by the master; adopting the theory that 'the instrumentalities intended for a particular purpose and suitable and proper for that purpose, do not break when put to the use for which they are designed, when used in a proper manner.'"

See, also, *Waight v. Lake Washington Mill Co.*, 48 Wash. 402, 93 Pac. 1069; *Johnson v. Columbia & Puget Sound R. Co.*, 74 Wash. 417, 133 Pac. 604. Thus this court has greatly extended and liberalized the prevailing rules as to negligence as between employer and employee in the interests of justice and humanity.

In the case at bar, had the pin unexpectedly broken without any known or apparent cause and thus caused an injury to the respondent, even though no defect had been discovered

theretofore and though adequate and constant inspection had been made theretofore, and no negligence on the part of the employee had occurred at the time of the unexpected breaking of the pin or previously, such occurrence would have raised an inference of defective condition of the pin and would doubtless have invoked the application of the rule of *res ipsa loquitur*, as in the *La Bee* case. In this case as it stands, we must acknowledge that no omission of inspection is shown; nor did "appellant know, or should it have known," as respondent alleged, of the defect, if any existed; it was unknown, at least until a very short time prior to the occurrence, to either the respondent or the appellant through the engineer. If the defect had existed before for some appreciable length of time and was one which ought to have been discovered by an inspection before the accident happened, this appellant would doubtless be liable. Under the facts as presented here, the pin may have simply jumped up at the very instant that respondent stumbled backwards over it, in the usual and ordinary way that the testimony shows such pins ordinarily jumped up in the handling of an engine, without any negligence being attributable to the master or its servants, and of which contingency respondent, as an experienced employee, was fully aware. There could be nothing more than a guess or conjecture that the condition of the pin or the drawbar was defective at the time the accident happened.

Under these facts, therefore, we are constrained to hold that there is no room for the application in this case of the principle of *res ipsa loquitur*, and that respondent failed to establish a *prima facie* case of negligence by any evidence whatever against appellant.

Such being the case, the judgment must be reversed with directions that the respondent take nothing by his action.

MOUNT, MORRIS, and PARKER, JJ., concur.

FULLERTON, J., dissents.

[No. 13522. Department Two. January 26, 1917.]

JOHN T. GRAY, *Respondent*, v. KATE L. HICKEY, *as Executrix etc., Appellant*, DAN EVANS *et al., Respondents.*[1]

EXECUTORS AND ADMINISTRATORS—CLAIMS — PRESENTATION — EVIDENCE—SUFFICIENCY. The evidence sustains a finding that a claim was duly presented to an executrix as required by Rem. Code, § 1479, where it appears that a claim duly verified was mailed to and received by the executrix.

MECHANICS' LIENS—WAIVER—CONTRACT. A provision in a contract for cutting wood that the contractor shall pay all bills for labor, etc., and prevent any liens being filed against the wood, does not waive the contractor's right to file a lien for a balance due him, but is merely an agreement to prevent liens by others.

SAME—FORECLOSURE—PERSONAL JUDGMENT. In an action to foreclose a contractor's lien for cutting wood, in which a portion of the claim is found to be lienable, the court has jurisdiction to render a personal judgment for the balance due on the contract.

TRIAL—JURY TRIAL—WAIVER. A jury trial, before entry of a personal judgment in an action to foreclose a lien for cutting wood, is waived by failing to make objection below prior to entry of final judgment.

EXECUTORS AND ADMINISTRATORS—ACTIONS—FORECLOSURE OF LIEN—CONDITION PRECEDENT—CLAIMS. No action can be maintained to foreclose a laborer's lien for cutting wood under a contract entered into with the deceased during his lifetime, whether the contract was performed wholly or in part after his death, where the claim was not presented to his executor or administrator for allowance or rejection.

EXECUTORS AND ADMINISTRATORS—ACTIONS—CONDITIONS PRECEDENT—CLAIMS—PARTIES INTERESTED—FORECLOSURE OF LIEN FOR BENEFIT OF LABORERS. Where a contractor for cutting wood filed a claim against the executrix of the owner's estate for the whole sum due under the contract, including unpaid sums due to his laborers, and prosecuted an action assuming the attitude that the laborers were entitled to participate in the benefits thereof, his claim against the estate, although not sufficient to support independent actions by the laborers to foreclose their individual liens, is sufficient to support a personal judgment in favor of the contractor, in which the laborers may be allowed to participate by including the amount due them for their work, without costs of suit in their favor.

[1]Reported in 162 Pac. 564.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered January 29, 1916, upon findings in favor of the plaintiff, in an action to foreclose a logger's lien, tried to the court. Reversed.

Guy E. Kelly and *Thomas MacMahon*, for appellant.

Wm. H. Pratt, *Chas. Bedford*, *Hoppe & Hoppe*, and *H. G. Fitch*, for respondents.

PARKER, J.—This action was commenced by the plaintiff, John T. Gray, in the superior court for Pierce county, to recover a balance alleged to be due him from the defendant Kate L. Hickey, as executrix of the estate of M. J. Hickey, deceased, for cutting cordwood under a contract entered into by the plaintiff with M. J. Hickey during his lifetime. The plaintiff also sought foreclosure of a lien claimed by him upon the wood, and sale of the wood thereunder in satisfaction of the whole amount claimed by him. Dan Evans, Ernest Baker, Albert Pitts and R. F. Henry were made defendants because they had been employed by Gray to assist in cutting the wood and had filed liens upon the wood for the amounts claimed by them respectively. The trial resulted in findings and decree awarding foreclosure of liens, to Evans for $41.50, to Baker for $41.50, to Pitts for $33.15, to Henry for $22.95, and to Gray for $28.20. The court also awarded personal judgment in favor of Gray against the defendant Kate L. Hickey, as executrix, for $118.50, being the balance found due Gray under his contract after deducting the amounts due upon the lien claims of himself and the cross-complainants, Evans, Baker, Pitts and Henry. From this disposition of the case, the defendant Kate L. Hickey, as executrix, has appealed to this court.

On March 1, 1915, respondent, Gray, and M. J. Hickey entered into a written contract whereby Gray was to cut into cordwood the timber upon a certain forty-acre tract of land belonging to Hickey in Pierce county and pile the wood after being cut, upon the land. Gray was to receive there-

for one dollar per cord for the cutting and piling of the wood. On the 5th day of each month, payment was to be made to Gray for all wood cut and piled during the month next preceding. Very soon after the entering into this contract, M. J. Hickey died, and soon thereafter his wife, appellant Kate L. Hickey, became executrix of his estate. Gray commenced work under the contract about the time of the death of M. J. Hickey, soon after the time of the making of the contract. Payments were made to Gray by Mrs. Hickey, as executrix, acting through her son, at the end of each monthly period in accordance with the contract, up to and including the month of June, 1915, the last payment being made July 2. During the months of July, August and September, Gray proceeded with the work, employing Evans, Baker, Pitts and Henry to assist him, agreeing to pay them therefor so much per cord according as their work would be for sawing or splitting or both, but amounting to slightly less than the dollar per cord for the finished product which Gray himself was to receive under the terms of the contract. Gray not being paid for the work done by him and his employees after June, on October 28, 1915, filed in the office of the county auditor of Pierce county his notice of lien upon the wood for the whole balance due him under the terms of the contract. Evans, Baker, Pitts and Henry not being paid for the work done by them, filed in the office of the auditor of Pierce county their notice of liens upon the wood on August 12, August 18, October 28, and November 1, for the amount due each of them, respectively. All of these claims of lien were made under Rem. Code, § 1162 *et seq.*

Before the commencement of this action, Gray caused to be presented to Mrs. Hickey, as executrix of the estate, his duly verified claim for the whole balance due him under the terms of the contract, in form as required by the statute relating to presentation of claims against estates of deceased persons. This claim as asserted by Gray included all sums due from him to Evans, Baker, Pitts and Henry. He has

conceded at all times that they are entitled to be paid out of whatever was due him upon the contract, in effect conceding in this action that judgment be rendered in their favor upon their claims and to be deducted from the judgment to be rendered in his favor, and claiming in effect that his presentation of his claim to Mrs. Hickey, as executrix, was as much for their benefit as for himself. The personal judgment for $118.50 awarded Gray against Mrs. Hickey, as executrix, is the balance found due to him under the contract after deducting the amounts due to Evans, Baker, Pitts and Henry and the amount of $28.20 awarded to Gray as a lien claim. This limiting of Gray's lien claim to $28.20 was done by the court, evidently on the theory that, while more was due him under the contract, that was all due him for his own personal labor upon the wood and hence all he was entitled to claim a lien for. He has not appealed from the judgment, and hence we have no occasion to inquire whether the court erred to his prejudice in so limiting his lien claim. Neither Evans, Baker, Pitts nor Henry ever filed any claim with Mrs. Hickey as executrix.

It is contended in appellant's behalf that the evidence fails to show the filing of any claim by Gray with Mrs. Hickey, as executrix, and that, therefore, he is precluded from maintaining any action against her as executrix, either as a lien claimant or otherwise, because of the requirements of our statute relative to presentation of claims against the estates of deceased persons, and especially Rem. Code, § 1479, providing that:

"No holder of any claim against an estate shall maintain an action thereon, unless the claim shall have been first presented to the executor or administrator."

This contention involves only a question of fact. We are quite convinced from a reading of the evidence that the claim was properly prepared and verified by Gray, caused to be mailed to Mrs. Hickey as executrix, and was received by her. We think this contention does not call for further notice.

We conclude that Gray's right of action is not impaired for want of proper presentation of his claim to Mrs. Hickey, as executrix.

It is contended that Gray waived his right to a lien for all sums to become due him under the contract, by the provision therein reading as follows:

"The party of the second part [Gray] agrees to do all of said work in a workmanlike manner and pay all bills for labor, groceries and all other expenses of carrying on said work and prevent any liens being filed against the said wood on account thereof."

We do not construe this provision of the contract as a waiver of Gray's lien right for the work to be performed by him. It, in any event, is not a clear waiver of such right. The rule seems to be that, when the terms of the contract are ambiguous in this respect, they should be construed most favorably to the person claiming the lien right. 27 Cyc. 263. This, we think, amounts to no more than an agreement to prevent liens of others being filed, and is not an agreement to refrain from filing a lien himself, should payment not be made to him according to the contract.

It is contended in appellant's behalf that the trial court erred in rendering personal judgment against Mrs. Hickey, as executrix, in favor of Gray. This contention apparently is rested upon the theory that, the action being originally one for the foreclosure of a lien and having in part failed in that respect, the rendering of a personal judgment for the balance of the claim is unwarranted, and that, in effect, she has been deprived of the right of trial by jury in so far as the personal judgment is concerned. It has been repeatedly held by this court that the rendering of a personal judgment under such circumstances, for a portion of the claim found not to be lienable, is proper and within the jurisdiction of the court in a foreclosure action, and that the defendant can in no event complain of the rendering of such a personal judgment where no objections thereto touching the right of

trial by jury was made until after its rendition. *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; *Spaulding v. Burke*, 33 Wash. 679, 74 Pac. 829; *Pacific Iron & Steel Works v. Goerig*, 55 Wash. 149, 104 Pac. 151; *Dolan v. Cain*, 59 Wash. 259, 109 Pac. 1009; *Hallett v. Phillips*, 73 Wash. 457, 132 Pac. 51. In this case, it is apparent that there was ample time within which counsel for appellant, Mrs. Hickey, could have made objections upon this ground to the entering of a personal judgment, after the court announced its decision to do so and before the judgment was finally entered. No such objection was then made. This silence on the part of appellant's counsel, in any event, was a waiver of the right to jury trial upon that question.

We now come to a consideration of the rights of respondents Evans, Baker, Pitts and Henry. While we conclude that neither of them can be awarded foreclosure of his lien claim, we conclude that each of them is entitled to the benefit of a personal judgment, but without costs in their favor, against Mrs. Hickey, as executrix, in favor of Gray, because of the peculiar circumstances here shown which place them in the shoes of Gray. Neither of them can be awarded a foreclosure of their claimed liens, because neither of them ever filed with Mrs. Hickey, as executrix, any claim as required by the statute as a condition precedent to the maintaining of an action against estates of deceased persons. It is contended that these claimants were not required to so file their claims with the executrix because Gray had already filed his claim which included all sums due them as well as Gray. While this, we think, was sufficient to support a personal judgment in favor of Gray for the whole balance due to him under the contract, out of which he concedes Evans, Baker, Pitts and Henry would be entitled to be paid and in that manner participate in the benefit of such judgment, such filing of a claim of Gray with the executrix would not support an independent right of action on the part of Evans,

Baker, Pitts or Henry as is sought to be maintained by their cross-complaints, which would have the effect of rendering the executrix liable for costs incurred by them in so enforcing their claims. It has become thoroughly settled by our decisions that a lien claimant whose right grows out of a contract entered into with a person and arising after his decease, cannot be enforced in an action against the estate of the deceased without first filing with the administrator or executor a verified claim therefor as required by Rem. Code, § 1479, above quoted. This question was reviewed at some length in the light of our former decisions in *Crowe & Co. v. Adkinson Construction Co.*, 67 Wash. 420, 121 Pac. 841, Ann. Cas. 1913D 273, where Judge Gose, speaking for the court, said:

"We are unanimous upon the point that there can be no enforcement of an involuntary lien against the estate of a deceased person arising out of an executory contract entered into with the deceased in his lifetime, whether the contract has been performed wholly or in part after his death, where the claim has not been presented to his executor or administrator. To state the matter in another form, the presentation of the claim of lien to the executor or administrator of the estate for allowance or rejection must, in such cases, be both alleged and proven, or the lien cannot be allowed. This view is in harmony both with the statute and with the principles announced in our own decisions and those in other jurisdictions. The presentation of the claim is not only in aid of orderly procedure in the probate of the estate, but it enables the executor or administrator to investigate the claim and to allow it if deemed meritorious, without being vexed with expensive litigation and delay in the settlement of the estate. We are not here concerned with a claim arising out of a contract, express or implied, with the personal representatives of the deceased."

In *Ward v. Magaha*, 71 Wash. 679, 129 Pac. 395, we held that the presentation of the claim is a fact as essential to the cause of action as the existence of the claim. This

was again recognized to be the law in *Seattle Nat. Bank v. Dickinson*, 72 Wash. 403, 130 Pac. 372. It seems plain, therefore, that neither Evans, Baker, Pitts or Henry have any cause of action against Mrs. Hickey, as executrix, maintainable as a lien against this wood, nor have they any cause of action of any nature against Mrs. Hickey, as executrix, apart from their right to participate in the cause of action maintainable as a personal one by Gray against her as executrix.

It is apparent that the trial court was of the opinion, and correctly so, that the amounts awarded to Evans, Baker, Pitts and Henry should have been awarded to Gray in the personal judgment awarded to him, had they been regarded by the court as not entitled thereto. Manifestly Mrs. Hickey, as executrix, owed these amounts to Gray in addition to the sum awarded to him by the personal judgment. While we deny the lien claims of Evans, Baker, Pitts and Henry, in view of the fact that they stand in the shoes of Gray, and by his consent, evidenced by his attitude throughout this case, are entitled to participate in the total amount due him from Mrs. Hickey as executrix, we conclude that they are entitled to have judgment rendered for their benefit by including the total amount of their claims in the personal judgment rendered in favor of Gray against Mrs. Hickey, as executrix, and have embodied therein proper order and direction which will secure the payment to them out of the proceeds of such judgment their several claims. We conclude, however, that they are not entitled to costs in their favor against Mrs. Hickey, as executrix, since, as we hold, they are not entitled to maintain actions upon their claims against her as executrix apart from the action maintained by Gray, and entitled only to participate in such judgment as Gray is entitled to recover against Mrs. Hickey as executrix personally, and this only because of Gray's consent as evidenced by his attitude throughout his prosecution of this case.

In view of all the circumstances shown, we conclude that Mrs. Hickey, as executrix, should not recover costs in this court against either Evans, Baker, Pitts or Henry, nor they recover costs against her. Respondent Gray will, of course, recover his costs in this court.

Some other contentions are made in appellant's behalf as against respondent Gray, but we think they are without merit and do not call for discussion here. Other contentions made as against Evans, Baker, Pitts and Henry are disposed of in our holding that their lien claims as such have failed.

The cause is remanded to the superior court with directions to amend its personal judgment against Mrs. Hickey, as executrix, in favor of Gray by including therein the amounts due from him to Evans, Baker, Pitts and Henry, with proper order therein securing to them participation in the proceeds of that judgment. The judgment is reversed in so far as it awards foreclosure of the lien claims of Evans, Baker, Pitts and Henry.

MORRIS, MOUNT, HOLCOMB, and FULLERTON, JJ., concur.

[No. 13539. Department One. January 26, 1917.]

AMELIA ECKHART, *Respondent*, v. CHARLES PETERSON, *Appellant*.[1]

PLEADING—BILL OF PARTICULARS. Where the specific damages are set forth with exactness, a bill of particulars cannot be required, since its function is not to set forth the cause of action.

PLEADING—MATERIAL VARIANCE—DAMAGES. Where the complaint in a civil action for rape specifically sets forth the damages claimed with all the exactness of a bill of particulars, it is error to admit, over the objection of the plaintiff, evidence of other injuries received in the assault such as severe injuries to the arm and displacement of the womb not alleged in the complaint.

APPEAL—REVIEW—PLEADING—AMENDMENT TO CONFORM TO PROOF. Trial amendments to the complaint will not be considered as made where evidence extending the issues was admitted over objection, no trial amendment was requested, and it cannot be fairly said that the theory of the trial was acquiesced in by the complaining party.

SAME—REVIEW—PLEADINGS—CONTINUANCE. In such a case, it is necessary to apply for a continuance only after the amendment is made, in view of Rem. Code, § 258, requiring a plain, concise statement of the facts.

SAME—REVIEW—PLEADINGS—HARMLESS ERROR. The admission of evidence extending the issues is not prejudicial where the only possible effect of the evidence was to augment the damages and no claim was made that the verdict was excessive.

APPEAL—REVIEW—OBJECTIONS NOT RAISED—NEW TRIAL. The objection that the verdict was excessive cannot be raised for the first time on appeal.

EVIDENCE—ADMISSION—OFFER TO COMPROMISE. In a civil action for rape, evidence is admissible that, when plaintiff charged the defendant with the paternity of her child and demanded a settlement, he did not deny it, and is not subject to the objection that it touches an offer to compromise, when the defendant did not offer to settle.

RAPE—CIVIL LIABILITY—DAMAGES—ISSUES—PATERNITY OF CHILD—EVIDENCE—ADMISSIBILITY. In a civil action for rape in which damages are claimed on account of the alleged pregnancy of the plaintiff, the paternity of the child is directly in issue and evidence is admissible tending to show that the plaintiff had had criminal relations

[1]Reported in 162 Pac. 551.

with any other person than the defendant at about the time that the child must have been conceived.

SAME. In such a case, a question, on cross-examination of the plaintiff as to whether she had had intercourse with any other man must be limited as to time.

APPEAL—REVIEW—TRIAL—HARMLESS ERROR. In a civil action for rape in which the paternity of a child is in issue, it is prejudicial error for counsel to remark on the child's resemblance to the defendant, and for the court, on objection, to state that the "baby has been in evidence for the past few days;" but the error is cured where no exceptions were taken and defendant had invited it by testifying that it resembled another man, and had acquiesced in its presence in court.

RAPE — CIVIL LIABILITY — EVIDENCE — ADMISSIBILITY — EXHIBITS. Upon an issue as to the paternity of a baby, in an action for rape, the baby cannot be made an exhibit, and its resemblance to its alleged father is too indistinct and uncertain to have any probative force.

SAME—CIVIL LIABILITY—DEFENSE—INCONTINENCE. In a civil action for rape, evidence of incontinence with other men is not admissible.

APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR. Error in the admission of acts of incontinence by plaintiff, suing for damages for rape, is harmless where it was offered only upon the measure of damages and there was no claim that the damages were excessive.

TRIAL—MISCONDUCT OF COURT—FAIR TRIAL. In a civil action for rape, defendant's constitutional right to a fair trial is infringed, where the court suggested the calling of the public prosecutor when one of the defendant's witnesses was testifying as to his own improper conduct with plaintiff, and it is immaterial that no exceptions were taken, since a requested instruction to disregard such comment might not have removed the effect.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered March 1, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Reversed.

Freece & Pettijohn, *H. C. Erickson*, and *W. E. Southard*, for appellant.

F. K. P. Baske, *C. J. Lambert*, and *Martin & Jesseph*, for respondent.

ELLIS, C. J.—Action for damages for personal injuries charged as the result of an assault and forcible rape which it is alleged was inflicted by defendant upon plaintiff on April 15, 1914. The specific injuries complained of and for which damages are claimed are set out in the complaint as follows:

"(1) . . . Said defendant rudely seized the plaintiff and committed an assault upon her as follows to wit: Dragging her into the bed room, throwing her upon the bed and raping her three times in succession, holding her all of the time flat on her back upon the bed for an hour or more, twisting, straining, and wrenching her back, thereby injuring it permanently. As a result of said raping and sexual intercourse had as above stated the plaintiff became pregnant and was delivered of a child January 18, 1915, all of which said acts so done by the defendant to the plaintiff were forcibly done by said defendant, with force and against the will and without the consent of this plaintiff.

"(2) That said defendant greatly frightened the plaintiff by entering said house seizing her and throwing her upon the bed and raping her, impregnating her, thereby causing her to have a child, all of which said acts caused her to suffer great mental pain and anguish, and did thereby damage this plaintiff in the sum of $11,000.

"(3) That said defendant by committing the assault upon this plaintiff as in said paragraph 1 stated, namely by seizing her, throwing her upon the bed, forcing her to have sexual intercourse with him for three times, forcing her to lay [lie] flat on her back for an hour or more, by permanently injuring her back, by wrenching and twisting it to such an extent that the plaintiff has suffered severe pain in the small of her back ever since, and by reason of the defendant's said treatment the plaintiff has been unable to work and has suffered great physical pain, and by reason of the defendant's raping the plaintiff as above alleged she became pregnant and in due time had a son by the defendant, all of which said acts so done by the defendant on the plaintiff were done contrary to her consent and against her will and consent, forcibly and maliciously, thereby causing this plaintiff to suffer great physical pain and torture to her irreparable

damage in the sum of $12,000, in which sum said defendant has damaged this plaintiff."

Then follows a prayer for judgment for $23,000 and costs. The cause went to trial upon the issues so tendered.

We shall not attempt to set out, even in substance, the disgusting details of the needlessly voluminous and hopelessly conflicting evidence adduced on both sides. It must suffice to say that plaintiff testified to the effect that she was an unmarried woman, twenty-two years old; that she was employed as a domestic in defendant's home for several months in 1913, and again from February on through haying time till about the middle of July, 1914, that, during his wife's absence at about two o'clock p. m. on April 15, 1914, defendant forcibly ravished her in the manner set out in the complaint. She admitted that she prepared the evening meal for defendant, his wife and son on that day, and, notwithstanding her alleged injuries, continued in his employment until the following July, doing the usual work of a domestic on the farm, from time to time attending dances with defendant and his wife, and made no complaint to any one till shortly before she gave birth to a child on January 18, 1915. Defendant positively denied any improper conduct with plaintiff, either with force or otherwise, and testified that he accompanied his wife to the town of Krupp on the day in question and did not return to his home till late that afternoon. In this he was corroborated by his wife and several other witnesses.

The jury returned a verdict for $5,000. At appropriate times, defendant moved for a directed verdict, for judgment *non obstante veredicto*, and for a new trial. All of these were denied, and judgment was entered upon the verdict. Defendant appeals.

I. Over appellant's objection that it was outside the issues tendered by the complaint, respondent was permitted to testify to a severe injury and bruising of her arm, resulting in much pain. Over the same objection, a physician was per-

mitted to testify that he had examined respondent shortly before the trial and found a displacement of the womb, resulting in "female trouble," which would probably necessitate an operation and which he attributed to childbirth. Appellant urges that the admission of this testimony was error. Respondent retorts that appellant should have moved to make the complaint more specific or to require a bill of particulars, and in any event should have moved for continuance when he saw the latitude which the evidence would be permitted to take. The complaint did not suggest the necessity for a bill of particulars, much less require it. A motion either to make more specific or for a bill of particulars soundly must have been denied. Moreover, the function of a bill of particulars is not to set forth the *cause* of action or *ground* of defense; these are a function of the original pleading. *Dudley v. Duval*, 29 Wash. 528, 70 Pac. 68. Here the complaint itself set forth the injuries therein mentioned with all the exactness of a bill of particulars. It would be a novel doctrine to hold where, as here, are set forth definite and specific injuries for which damages are claimed without any allegation, either general or specific, of other injuries, that, unless the defendant demand further specification, he assumes the risk of having to meet, over timely objection, evidence as to injuries not specified, both direct and consequential. Under such a doctrine respondent might just as well have been permitted to introduce evidence of a broken leg, impaired sight or hernia without pleading anything of the kind. While some latitude must be allowed to a pleader in his specification of injuries complained of (*Clukey v. Seattle Electric Co.*, 27 Wash. 70, 67 Pac. 379), the injuries of which proof is admitted must be such as would be expected naturally to result from those alleged, either specifically or generally. *Horton v. Seattle*, 53 Wash. 316, 101 Pac. 1091; *Howells v. North American Transp. & Trading Co.*, 24 Wash. 689, 64 Pac. 786.

Nor was it incumbent upon appellant to move for a continuance, in the absence of an amendment to the complaint. He had the right to demand a correct ruling confining the evidence to the issues as made up, thus forcing respondent to stand on her pleading or ask leave to amend. After such amendment, and then only, should the failure to ask a continuance on the ground of surprise be construed as a waiver. Any other view would practically abrogate the necessity for framing issues by a plain and concise statement of the facts as required by statute, Rem. Code, § 258, and would make an objection to the introduction of evidence as outside the issues an idle formality. The rule that, where issues have been extended through the admission of evidence which would have warranted a trial amendment, such amendment will be considered as made, is not invokable where the evidence was admitted over objection and no trial amendment was requested. *Oldfield v. Angeles Brewing & Malting Co.*, 72 Wash. 168, 129 Pac. 1098. It is true that we have often held that, where certain matters were treated as in issue at the trial, the theory upon which the trial proceeded cannot be rejected for the first time in the appellate court. See *Haas v. Washington Water Power Co.*, 93 Wash. 291, 160 Pac. 954, and cases there cited. But that rule only applies where it may be fairly said that the trial theory was acquiesced in by the party complaining. The contrary appears in the case before us.

It does not follow, however, that the admission of the evidence complained of was prejudicial. Its only possible effect was to augment the damages. So far as the record shows, no claim of excessive verdict was made in the lower court. The motion for a new trial was based upon all of the statutory grounds save the fifth and the sixth, which alone refer to excessive recovery. We must assume that this ground was omitted from the motion advisedly. The claim that the damages are excessive cannot be raised for the first time in this court. Moreover, even in this court, though in the brief it

is asserted that the verdict is excessive, none of the assignments of error are based upon that specific ground.

II. Respondent and her mother were permitted to testify, over objection, to a conversation had by them with appellant in which they charged him with the paternity of the child and demanded a settlement, at which time they stated in substance that he refused to settle, but did not deny the paternity of the child. It is urged that this impinged the rule against the admission of evidence touching an offer to compromise. We think not. Appellant made no offer to settle, nor did he seek an interview for that purpose. Neither of the witnesses so testified. The record shows that the evidence was offered solely for the purpose of showing that, when charged with the paternity of the child, appellant did not deny it. It was clearly admissible for that purpose. *Ewing v. Bass*, 149 Ind. 1, 48 N. E. 241; *Rose v. Rose*, 112 Cal. 341, 44 Pac. 658; 1 Rice, Evidence, p. 424.

III. On cross-examination, respondent was asked: "Was this the first time you ever had intercourse with a man?" She answered: "Yes." Upon motion of her attorney, this was stricken as not proper cross-examination. This is assigned as error. It is obvious that, in any view of the matter, the striking of this answer was not prejudicial to appellant. But, since the judgment must be reversed on another ground, we deem it expedient now to determine to what extent inquiry as to prior specific acts of unchastity may be carried, so that error in that respect may be avoided on another trial. In this state the law as to inquiry touching prior specific acts is reasonably well settled in criminal prosecutions for sexual offenses. In such criminal prosecutions, with one exception, which we shall presently notice, it is only where a *previous chaste character* of the prosecuting witness is by statute made an essential element of the offense that evidence of prior specific acts of incontinence on her part with others than the accused may be elicited, either on her cross-examination or

by the testimony of other witnesses. For instance, in prosecutions for seduction under Rem. Code, § 2441, which makes previous chaste character an essential, such inquiry is admissible. *State v. Jones*, 80 Wash. 588, 142 Pac. 35. It is also admissible in prosecutions for statutory rape of a female child "fifteen and under eighteen years of age, and of previously chaste character," under the third subdivision of Rem. Code, § 2436. *State v. Workman*, 66 Wash. 292, 119 Pac. 751. The ground of admission in such cases, namely, that actual physical chastity is an essential element of the crime, hence directly in issue, is fully discussed in the two decisions cited and need not be further elucidated here.

In criminal prosecutions for forcible rape, such evidence of prior acts cannot be elicited, either by cross-examination of the complaining witness or by evidence of third persons. This, for the reason that her previous chaste character is not an essential element of the crime of forcible rape, hence not directly in issue. Therefore she should not be expected to meet any number of collateral issues and explain every act of her life, nor to rebut possible false evidence of such specific acts of incontinence. She should only be required to defend her prior general reputation for chastity as bearing upon the question of consent, which is always in issue and is a very different thing from actual previous chastity. *State v. Holcomb*, 73 Wash. 652, 132 Pac. 416; *State v. Ogden*, 39 Ore. 195, 65 Pac. 449. Our attention has been called to no decision of this court, and we recall none, in which the question here involved has been passed upon in a civil action for damages for assault aggravated by forcible rape and resulting pregnancy.

We have adverted, at the risk of prolixity, to the rule as applied by this court in the two classes of criminal cases merely to mark its basis, which is to prevent a confusion of issues and unfair surprise, and to show that, even in those cases, we have refused to extend the rule of exclusion beyond its only rational basis; that is, to cases where actual previous

chaste character is essentially in issue. In the civil action for damages for assault aggravated by rape and pregnancy, it is obvious not only that the issues are broader, but also that the quantum of proof required to establish their affirmative is less. Greater latitude should therefore be given the defense. The issues involve not merely the fact of assault and rape, but also the paternity of the child and consequent damages, neither of the last two elements being in issue in criminal cases.

Even in criminal prosecutions for forcible rape which it is claimed resulted in pregnancy, and the woman's evident condition before the birth, or the child itself afterwards, is called to attention of the jury, evidence of dissolute habits or specific acts of unchastity at about the time when the child must have been begotten are admissible, not as a defense, but as tending to account for her condition and meeting the prejudice against the accused which the fact of pregnancy of the prosecuting witness would probably create in the minds of the jurors. *State v. Mobley*, 44 Wash. 549, 87 Pac. 815; *State v. Blackburn* (Iowa), 110 N. W. 275; *State v. Bebb*, 125 Iowa 494, 101 N. W. 189; *People v. Flaherty*, 29 N. Y. Supp. 641. In the case here, since damages were asked not only for the assault and rape, but also for the resulting pregnancy and the physical and mental pain and suffering occasioned thereby, it is plain that the paternity of the child was directly in issue, and any evidence reasonably tending to cast doubt upon that question should be admitted in defense. Evidence was admissible, therefore, whether elicited by cross-examination of the woman herself or through the testimony of other witnesses, tending to show that she had had criminal relations with any other person than appellant at about the time when in the nature of things the child must have been begotten. *Young v. Johnson*, 123 N. Y. 226, 25 N. E. 363; *Smith v. Yaryan*, 69 Ind. 445, 35 Am. Rep. 232; *Watry v. Ferber*, 18 Wis. 500, 86 Am. Dec. 789; *Whitman v. State*, 34 Ind. 360; 5 Jones, Commentaries on Evidence, p. 168,

§ 835. The question put to the respondent in this case was not limited as to time, hence the answer was properly stricken.

IV. The following incident is assigned as error. On the second day of the trial, appellant had testified to certain indiscreet demeanor of respondent with one Hoch during and prior to April, 1914, and had expressed the opinion that the baby looked like Hoch. On cross-examination, respondent's counsel called attention to the child and claimed that it resembled appellant, stating, "We have the baby here . . . if he desires to show it to the jury." Appellant's counsel objected, whereupon the court said: "You want it to appear as an exhibit in the case," and after further objection on counsel's part to the effect that the introduction of the baby was not proper nor a part of the cross-examination, the court said: "I think the baby has been in evidence for the past two days. I have seen it." [Addressing the jury,] "Gentlemen, have you seen it?" The jury answered, "Yes." The court, "I thought so." All of this was, of course, error, and highly prejudicial. But it was invited by appellant when he testified to the resemblance of the child to another man, and no exeception was taken to the court's remarks. Moreover, the record shows that the baby was in the court room on the first day of the trial and had been referred to by counsel for appellant in the presence of the jury. Having submitted to, and attempted to profit by, the baby's presence, counsel cannot now take advantage of the error. In view of a possible retrial we will say, however, that it is clearly the better rule to permit no reference to a supposed resemblance of the child to any one. The child cannot be made an exhibit, and the resemblance of a baby to its father is too indistinct and uncertain to be admissible as having any probative value. *State v. Danforth*, 48 Iowa 43, 30 Am. Rep. 387; *Gray v. State*, 43 Tex. Cr. 300, 65 S. W. 375; *State v. Neel*, 23 Utah 541, 65 Pac. 494.

V. The refusal of the court to permit appellant to prove various acts of incontinence by respondent with other men,

sometimes reclining on the ground, once leaning against a fence, soon after the alleged assault, is assigned as error. Such evidence is, of course, inadmissible as bearing upon the main issue. But the context of the offer here shows that it was advanced as tending to rebut respondent's testimony that in the assault appellant had brutally and permanently injured her back. Such injury would certainly have rendered an early submission to sexual embraces in such positions, at least, highly improbable. Properly limited by instruction, the evidence was clearly admissible for the purpose for which it was offered. But here, again, we are met by the fact that the offered evidence went only to the question of damages, and there was no claim in the court below that the damages awarded are excessive. Standing alone the error was without prejudice.

VI. Finally, a claim of error is predicated upon the following incident. A witness was testifying to certain indecent liberties he had taken with respondent in the fall of 1912, about eighteen months prior to the alleged assault, resulting in an offer on her part to submit for money. In the course of the story, respondent's counsel objected to the evidence. The objection was overruled, but the court said: "You might call the prosecutor in here though—never mind, go ahead with the story." This was a most damaging comment, either upon the character of the witness or upon the credibility of his testimony. True, no exception was taken to the court's remark, and he did instruct the jury in his general charge and in a general way to disregard any remarks of court or counsel. But under the rule announced in *State v. Jackson*, 83 Wash. 514, 522, 145 Pac. 470, these things cannot be permitted to preclude an insistence by a party upon his constitutional right to have his evidence submitted to the jury without comment by the court, when, as here, we cannot say that an instruction to disregard such comment would have removed its effect. The reasons are so distinctly and forcibly put in the *Jackson* case and

in the decisions there quoted as to require no restatement here. See, also, *State v. Crotts*, 22 Wash. 245, 60 Pac. 403.

It is argued that, in any event, the things to which the witness was testifying were incompetent in that they related to a specific incident of lewdness committed by respondent long prior to the time of the alleged assault, and, therefore, could have had no bearing upon the question of the paternity of the child. It is true, as we have already pointed out, that evidence of prior specific acts, when too remote to have any bearing upon the question of paternity, are inadmissible. But notwithstanding the fact that the court was admitting the evidence erroneously, the witness was offered by the appellant as one worthy of belief. The court's comment was, therefore, as prejudicial to appellant as if the testimony of the witness had been competent. It was a reflection upon one of appellant's witnesses, whose credibility was solely for the jury, thus tending to prejudice appellant's whole defense. The sole province of the court in the premises was to pass upon the admissibility of the evidence. Having ruled it admissible, he invaded appellant's constitutional right by commenting upon the evidence in any way not reasonably necessary to a ruling on its admissibility. It would be a pernicious rule to permit an escape from one palpable error through the commission of another of a wholly different character. A fair trial does not consist in the matching of errors.

The record before us presents many errors. While we have been unable to say that any one standing alone, save that last noticed, was prejudicial, that one was clearly so.

Judgment reversed, and cause remanded for a new trial.

MORRIS, MAIN, and CHADWICK, JJ., concur.

[No. 13559. Department Two. January 26, 1917.]

ALICE L. LICHTENBERG *et al.*, *Respondents*, v. THE CITY OF SEATTLE, *Appellant*.[1]

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS — PROXIMATE CAUSE —CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In an action for personal injuries sustained in a fall when plaintiff stepped from a bus to the pavement, the fact of stepping upon a defective iron grating in the pavement, which was the proximate cause of the accident, is not left to speculation or conjecture, but is properly a question for the jury, where it appears that the grating was between the bus and the sidewalk, that it was broken and covered with trash, that the plaintiff stepped on something that gave way and caught her foot, and caused her to fall upon the edge of the sidewalk.

SAME—DEFECTIVE STREETS—CITY'S NOTICE OF DEFECT—EVIDENCE. There is sufficient evidence that the city had notice of a defect in an iron grating in a pavement, where it appears that the grating was broken and out of repair in June, and that city employees cleaned it nearly every day until November, and there was no evidence that it had been changed.

WITNESSES—COMPETENCY. A witness is competent to testify that she had noticed a broken iron grating at a certain place some months before, although she could not identify the particular grating offered in evidence, where she said it looked the same and she was satisfied it was the same grating.

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The contributory negligence of the plaintiff in stepping from a jitney bus onto a defective iron grating in the pavement is a question for the jury, where it appears that the grating was between the bus and the sidewalk, that it was covered with trash, and the plaintiff could not see the defect.

Appeal from a judgment of the superior court for King county, Smith, J., entered April 11, 1916, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained through a defect in a street. Affirmed.

Hugh M. Caldwell, Frank S. Griffith, and *Walter F. Meier*, for appellant.

Blair & Blinn, for respondents.

[1]Reported in 162 Pac. 534.

MOUNT, J.—The respondents recovered a judgment for five hundred dollars for personal injuries to Mrs. Lichtenberg. The defendant has appealed from that judgment.

It appears that, on the 11th day of November, 1915, Mrs. Lichtenberg took passage in a jitney bus, from 30th and Jackson streets, in the city of Seattle, to the northwest corner of Third avenue and Columbia street. At this corner there is a sewer intake set against the curb and extending into the street about eight inches. This sewer intake is covered with an iron grating. The jitney bus, in which Mrs. Lichtenberg was riding, stopped at this corner of the street, about three feet from the sidewalk and in front of the iron grating. Mrs. Lichtenberg did not see the iron grating. It was too far for her to step from the running-board of the automobile to the sidewalk, and she stepped down and upon the pavement. Her foot was caught in the broken iron grating. She fell upon the curb of the sidewalk and broke her arm. In describing how the accident happened, she said:

"I got out of the machine and I felt something give way under my foot, and my shoe seemed to catch in something, I could not get it free and it—and it throwed me and I don't remember very much for a few minutes. It kind of dazed me. The first thing I remember is of someone holding me up from the back, under my arms."

She then testified as follows:

"Q. Tell the jury about how far the automobile stopped away from the curb, if you know? A. Well I don't know as I know exactly, but I know it was too far for me to step from the machine on to the sidewalk. Q. Where did you step? A. Down on the street. Q. On the paved part of the street? A. Yes, sir. Q. What was the condition of the street as to there being running water there? A. I know it was raining very hard and the water seemed to be running in the street, on the sides. Q. Right down next to the gutter? A. Yes, sir."

The evidence shows that, when Mrs. Lichtenberg was picked up, she was lying upon the edge of the sidewalk,

with her feet across this intake; that the grating over the intake was a cast-iron grating; and that one corner and one of the bars were broken off, so as to leave quite a large hole in the iron grating.

It is argued by the appellant that there is no evidence to show that Mrs. Lichtenberg stepped upon this iron grating, and, if the iron grating was defective and out of repair, there is no evidence to show that that condition of the grating was the proximate cause of the injury; that the jury could not reach the conclusion that Mrs. Lichtenberg was injured upon this grating without resorting to conjecture, guesswork and surmise; and that, for this reason, the trial court should have directed a verdict in favor of the appellant and should have granted a judgment notwithstanding the verdict. This court has frequently held that juries will not be permitted to arrive at verdicts by conjecture. *Jock v. Columbia & Puget Sound R. Co.*, 53 Wash. 437, 102 Pac. 405; *Armstrong v. Cosmopolis*, 32 Wash. 110, 72 Pac. 1038; *Anton v. Chicago, Milwaukee & St. Paul R. Co.*, 92 Wash. 305, 159 Pac. 115. But it is also held that:

"Negligence, while never presumed, may nevertheless be proved, like any other fact, by circumstantial evidence." *Jensen v. Schlenz*, 89 Wash. 268, 154 Pac. 159.

See, also, *Sweeten v. Pacific Power & Light Co.*, 88 Wash. 679, 153 Pac. 1054; *Abrams v. Seattle & Montana R. Co.*, 27 Wash. 507, 68 Pac. 78; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 68 Pac. 896, 92 Am. St. 847, 58 L. R. A. 313.

We think the evidence and the circumstances shown in this case take it out of the rule of conjecture. It is true, the respondent Mrs. Lichtenberg testified that she stepped upon the pavement, but it is apparent that she meant that she stepped down upon the street which was paved. The automobile in which she was riding stopped about three feet from the curb of the sidewalk. It stopped in front of this iron grating. The distance was too far for her to step from

the automobile upon the sidewalk, and she stepped down upon the street. She, no doubt, stepped from the car upon the iron grating. The defective condition of this iron grating was not apparent to her. The testimony shows it was covered with some papers and trash which had washed into it. She says her foot caught in something and she could not get it free and it threw her. The fact that the iron grating was broken, the fact that the iron grating was between the automobile and the sidewalk, the fact that she stepped on something which apparently gave way under her foot, and caught her foot and she could not get it free and when she fell, lay across the grating, we think, show almost conclusively that she stepped upon the defective iron grating which caused her injury. We are of the opinion, therefore, that this case is not controlled by the rule of speculation and conjecture, but is controlled by the rule that the cause of the injury may be proved by circumstances.

The appellant further contends that there is no evidence of the fact that the city had notice of the defective condition of this iron grating. One witness testified that she noticed this iron grating and its broken condition in June before the accident, which happened in November. The evidence also shows that the servants of the city passed by this grating and cleaned it off most every day. If the iron grating was broken and defective in June, the presumption would be that it remained that way until November, unless there was some evidence to show that it had been changed in the meantime, and there was none. We think this evidence was sufficient to show that the city had notice, or should have taken notice, of the condition of the grating. We think the evidence was clearly competent. It is true this witness said she could not identify the particular grating which was offered in evidence, but she finally testified that it looked the same, and that she was satisfied it was the same grating.

It is finally argued by the appellant that the respondent was guilty of contributory negligence in stepping upon the

grating, and that, therefore, she should not recover. Whether she was guilty of contributory negligence, under the circumstances which we have hereinbefore stated, was clearly a question for the jury.

We find no error in the record, and the judgment is therefore affirmed.

HOLCOMB, FULLERTON, and PARKER, JJ., concur.

[No. 13568. Department Two. January 26, 1917.]

OSWALD A. WEIDLICH *et al.*, *Appellants*, v. INDEPENDENT ASPHALT PAVING COMPANY, *Respondent*.[1]

TRIAL—ISSUES—LAW OR EQUITY—JURY TRIAL. In an action in ejectment to recover parts of a vacated street that had been in controversy in a previous action, equitable issues are presented which make it proper to discharge the jury and try the case as an action to establish boundaries, under Rem. Code, § 947, where it appears that the parties are adjoining landowners, that, in the former action to recover possession of the strip of land, the verdict and judgment for a recovery of possession did not define the center of the street constituting the boundary line, which was still in dispute.

EJECTMENT—TRIAL—VERDICT—SUFFICIENCY. In an action of ejectment between adjoining landowners, a general verdict merely finding for the plaintiff is defective in that it does not comply with Rem. Code, § 795, requiring the jury, if their verdict be for the plaintiff, to find that he is entitled to possession of the property described in the complaint, and the nature and duration of his estate.

JUDGMENT—RES ADJUDICATA—EJECTMENT—MATTERS CONCLUDED. In an action of ejectment between adjoining landowners, judgment upon a defective verdict merely finding for the plaintiff, is not *res adjudicata* or a bar to a second action to establish the lost boundary line upon the ground, under Rem. Code, § 795, where the former judgment was merely to the effect that the plaintiff recover possession of the premises, which were not described with sufficient accuracy to enable possession to be delivered without reference to matters outside the judgment.

APPEAL—REVIEW—TRIAL DE NOVO. Where an action was erroneously dismissed at the conclusion of the plaintiff's case on a chal-

[1]Reported in 162 Pac. 541.

lenge to the sufficiency of the evidence, there cannot be a trial *de novo* on appeal, but the case must be sent back for a new trial.

BOUNDARIES—LOST CORNERS—EVIDENCE—SUFFICIENCY. In an action to establish a lost boundary line, evidence to the effect that the defendant set his fences seventeen feet beyond the line indicated by stakes of the original survey, some of which were still standing, is sufficient to make out a *prima facie* case.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered November 26, 1915, in favor of the defendant, upon sustaining a challenge to the evidence, dismissing an action of ejectment, tried to the court. Reversed.

E. C. Million and *Jesse A. Frye*, for appellants.

John W. Roberts and *J. L. Runner*, for respondent.

HOLCOMB, J.—Although appellants brought their action in the form of ejectment, upon the opening statement of counsel for appellants in the trial below, the court determined that the action was in substance an action to determine whether or not the boundaries of the lands between appellants and respondent had become lost or uncertain, they not being able to agree upon the establishment of the same, and that the action was, therefore, one to establish the boundary of lands and triable, under Rem. Code, § 947, by the court as a court of equity. The court thereupon discharged the jury and proceeded thereafter to the trial of the case as an equitable cause to establish lost or uncertain boundaries. This action, we think, was correct, as will more fully appear by the statement of the issues, controversies, and facts of the case so far as presented.

It is true that an intrusion by one landowner of his structure upon the land of an adjoining landowner without permission is a trespass, and may be treated as a disseizin for which ejectment will lie. Appellants own land adjoining that of respondent, the conceded division line being the center of Allison street on the plat known as the replat of Port

Orchard, Kitsap county, Washington. The property, however, is not within the limits of any municipal corporation; the land of appellants lies on the north, and that of respondent on the south, of that street. The replat of Port Orchard was vacated in 1908, and each party, by reason thereof, became the absolute owner to the center of Allison street. Hence, both parties proceeded upon the theory that the center of that street was the true dividing or boundary line.

This is the second action involving this boundary line. In the former action the respondent here was the plaintiff and these appellants and certain other persons were defendants. That case was appealed to this court and is reported in *Independent Asphalt Paving Co. v. Hein*, 73 Wash. 127, 131 Pac. 471, 134 Pac. 521. That action was brought by the respondent here to recover possession of "a strip of land 120 feet in width by about 2,500 feet in length, or some part thereof."

In this action appellants averred that, at the time of commencing the action and for many years last past, they had been, and were, the owners in fee simple and entitled to the possession of the property described as blocks 65, 66, and 67 of the replat of Port Orchard City, save and except lots 9 and 10 of block 66, together with the streets lying in front of and adjacent to said lots, and especially that plaintiffs owned the north half of the street designated in said plat as Allison street in front of said blocks, the plat of said blocks having been vacated by the board of county commissioners on January 7, 1908, and that on May ——, 1914, defendant did, wrongfully and unlawfully, enter upon said lands, and particularly upon blocks 65, 66, and 67, and the north half of said Allison street, and did dig up the soil and take possession thereof and build a fence thereon, and ever since said time has refused to quit or surrender up possession thereof to plaintiffs, all to their damage.

For answer to appellants' complaint, respondent denied all those allegations, and for a second and affirmative answer, entered the plea of *res adjudicata*, setting up the proceed-

ings, verdict, judgment, appeal and affirmance thereof, which was reported in the 73 Wash. decision. It is alleged, among other things, that, in that former action, the issues were presented between this respondent as the plaintiff and these appellants as part of the defendants; and that, in that action, the judgment rendered and entered firmly fixed and established the respective rights of the parties to this action in relation to all matters of ownership of the premises in question and the lines and measurements of the property owned by the respective parties herein, and the entire controversy now sought to be litigated in this action was finally litigated in the former action and became and is *res adjudicata*, and every issue sought to be raised and presented in this action was finally adjudicated in favor of this respondent in that former action. It was alleged in this plea that the verdict of the jury in that former action was as follows:

"We, the jury in the case Independent Asphalt Paving Company plaintiff, vs. Joseph N. Hein *et al.*, defendant, find for the plaintiff.

"Dated at Port Orchard, Washington, this 7th day of March, 1912. John G. Carlisle, Foreman."

There was also set forth the judgment in the former action, which was in form that:

"Plaintiff have and recover judgment herein for the possession of the premises in controversy herein, and that the defendants be and they are hereby required to remove the fences heretofore erected upon the property of the plaintiff and recover of and from the defendants their costs and disbursements. Dated March 13, 1912."

A third affirmative defense was also pleaded in this action, alleging, in substance, that respondent, long prior to the commencement of the former suit referred to in the other affirmative answer, was, and ever since has been, the owner in fee simple of blocks 54, 61, 64, 68, 69 and 70, of the replat of Port Orchard City; that included in that replat was a street called Allison street, lying to the north

of blocks 68, 69, and 70, which was sixty feet in width, and that, on January 7, 1908, by order of the board of commissioners of Kitsap county, the plat or replat of a part of blocks, including those now in controversy, and the streets and alleys included therein were vacated, and that the streets therein vacated ceased to exist as public streets, and the respondent became then and thereby vested with the absolute right of possession of all that half of those streets and each of them adjacent to and abutting upon the blocks owned by the respondent; that it immediately took possession of the half of those streets and each of them belonging to it, and ever since has been, and is now, in the open, exclusive, and peaceable possession of the premises and each and every part thereof, and has at all times been, and is now, entitled to the exclusive ownership and possession of all such parts of the vacated streets, as against appellants and any other person or persons whomsoever; that the claim asserted by appellants constituted a cloud upon its title, etc.

Appellants demurred separately to the plea of *res adjudicata* and to the third affirmative defense of respondent, by general demurrers, which were overruled. Appellants then replied to the affirmative answers of respondent, denying that the action mentioned or the judgment referred to in its plea of *res adjudicata* affirmatively fixed or established, or in any manner fixed or established, the respective rights of the parties to this action in relation to the matters of ownership, boundary lines, or measurements of the property owned by appellants, and denied that the issues raised and presented to the court in this action had been in any manner adjudicated in the former action. And replying to the third affirmative defense of respondent, appellants admitted that respondent was the owner of the blocks in the answer described, and that it owned the south half of Allison street while appellants owned the north half thereof, and admitted that the replat of Port Orchard had been vacated, but denied that each of the adjacent owners on Allison street had taken pos-

session of their respective halves; on the contrary, alleged that respondent had taken possession of all of that street and ousted appellants from the possession thereof.

Upon these issues, when the cause came on for trial, counsel for appellants made an opening statement to the court and jury in which, among other things, it was stated, that appellants, with the exception of two lots, owned blocks 65, 66, and 67 of the replat of Port Orchard, on the north side of Allison street, and that respondent owned the opposite three blocks on the south side of Allison street, and that that street had been vacated; that there was no controversy but that each party took to the center of the street, appellants from the north and respondents from the south, the question for determination being the location of the center line of Allison street. When the plat of the addition was made, it was surveyed and the survey staked out the blocks by putting a stake at each corner thereof, the real controversy being whether the surveyor made a mistake when he tied up the survey of the addition to the government post, respondent claiming that, in order to fix the lines, he must go to the government meander point and survey from there to the described plat, appellants claiming that the surveyor, by surveying the plat and setting the stakes, fixed the boundary regardless of whether the stakes were set at a proper distance from the meander corner or not; that, when a purchaser buys with reference to the stakes set, the stakes govern whether the surveyor be right or wrong; respondent claiming that, if a survey be made from the permanent government monument, Allison street would be something more than 100 feet further north and off on appellants' land; that a former trial had been had between these parties and other persons wherein this respondent claimed to the center of Allison street, and that these appellants had put a fence 120 feet south of that line, and judgment was rendered for them in that action, but that it had moved its fence over 137 feet from the alleged line, or 17 feet beyond where it

claimed the line in the former trial. Appellants contend, that the judgment in the former trial is not binding because of its uncertainty, and that no boundary line was determined in that action; that respondent is 137 feet on appellants' land; that they will show that the boundary line between theirs and respondent's land is 137 feet south of a certain fence constructed by respondent, and that, even though the court should find that the former judgment is binding as to the 120 feet, respondent is still in possession of the 17 feet of appellants' land which has never been litigated; but in no event is the judgment in the former action binding.

It was upon these issues and upon this opening statement that the trial court held—and we hold correctly—that the action was in essence one to determine and fix a lost or uncertain boundary line.

The first question to be determined, and one of considerable importance and difficulty, is whether or not the proceedings, verdict and judgment in the former action adjudicated all the matters now in dispute. It must be conceded that the verdict in the former action was defective. In such a possessory action as was the former action, under our statute, Rem. Code, § 795, it is required that:

"The jury by their verdict shall find as follows: (1) If the verdict be for the plaintiff, that he is entitled to possession of the property described in the complaint, or some part thereof, or some undivided share or interest in either, and the nature and duration of his estate in such property, part thereof, or undivided share or interest in either, as the case may be."

The verdict did not comply with the statute, and the judgment on the verdict went no further. Whatever may have been the allegations in the complaint in the former action, the real questions at issue were substantially the same as the questions at issue here, viz., where, *on the ground*, is the center line of Allison street between the blocks owned by these parties on either side of it? The verdict and judg-

ment simply said that the jury found for the plaintiff, that it was entitled to the possession of the land it claimed. The question of the sufficiency of the verdict and judgment was not raised in the former case or upon appeal to this court, and the respondent here claims, and the trial court thought, that appellants are now concluded and estopped because they should have presented that question upon the former appeal; that if the defect in the verdict and judgment had been suggested to this court, this court, no doubt, would have determined the matter then and corrected it or ordered it corrected by retrial.

While in general it is true, and a general rule and our statutory rule, Rem. Code, § 793, that the property shall be described with such certainty as to enable the possession thereof to be delivered if a recovery be had in ejectment, yet when one of the objects of the suit is to ascertain and determine the limitations of the property involved in uncertainty in the complaint, as to the exact description, it may be aided and cured by the evidence in that respect and the finding of the court or verdict of the jury. This the respondent, who was the plaintiff and successful party in the former action, did not obtain. While, ordinarily, we would be disposed to hold that it would be *res adjudicata*, where the matter might if necessary have been presented upon appeal and determined, the difficulty in this case is that, in such a case as that, how may the judgment be enforced by the court having the power to enforce a valid judgment? The judgment relied upon as *res adjudicata* to the present case did not determine or settle the controversy between the parties to that action because it did not establish, fix, or determine the division line between the properties involved or describe the disputed tract so that it could be identified. The rule is practically universal that:

"The premises should be so described that the record will furnish evidence of the limits to which title is established

by the judgment, as well as to point out to the sheriff who serves the writ of possession the extent and location of the land recovered. . . . In order that the controversy between the parties may be definitely settled, we think the boundary lines should be accurately located and the disputed tract described with precision." *Porter v. Counts*, 6 Cal. App. 550, 557, 92 Pac. 655.

See, also, *Davis v. Judge*, 44 Vt. 500; *Tracy v. Harmon*, 17 Mont. 465, 43 Pac. 500; *Hoover v. King*, 43 Ore. 281, 72 Pac. 880, 99 Am. St. 754, 65 L. R. A. 790; *Franklin v. Haynes*, 119 Mo. 566, 25 S. W. 223; *College Corner & R. G. Road Co. v. Moss*, 92 Ind. 119; *Griffin v. Hall*, 111 Ala. 601, 20 South. 485; *Lundell v. Allen & Nelson Mill Co.*, 57 Wash. 150, 106 Pac. 626; 23 Cyc. 1121, 1235; 15 Cyc. 176.

As was said in *Franklin v. Haynes, supra*, which is extremely applicable here:

"The issue in the case was, what portion of the land, if any, was in defendant's possession. It seems to me that the judgment settles nothing, but leaves the rights of the parties where the pleadings and admissions left them. The issue is left to the determination of the sheriff when he undertakes to execute the writ. How could the sheriff know from a writ which follows the description contained in the judgment, where the line between these proprietors lay. The parties disagree, the witnesses differ, and the court does not decide.

"The judgment for possession, where division lines are in dispute, should describe the land adjudged with sufficient certainty to enable the executive officer of the court to correctly and intelligently execute a writ of possession."

In passing upon this case, the trial court referred to the testimony in the former case, and found that the witnesses in the former case went over practically the same questions as were presented in this case. He stated that he did not know what the judgment in the former case meant and that he did not know how it could be enforced. Nor do we.

It seems to us that such a case as this is not governed strictly by the ordinary rule of *res adjudicata*, and whatever should have been litigated in the former suit is presumed to

have been litigated, for the reason that, in a possessory action such as that was, the identity of the property adjudged to be the property of one or the other must be sufficiently described in the judgment that there may be no reference to any matter outside the judgment, in order to be able to enforce the judgment against the other party. That is not the case here. We cannot refer to the judgment and determine exactly where the title of either the plaintiff or the defendants in that case extended, and to what exact extent the right of possession was granted the plaintiff in that case. And that shows more emphatically that, whatever may have been the form in which the present action was brought, the trial court was justified in treating it as an action to determine the true boundary or the true location of Allison street and the center line.

The case rests here on the *prima facie* case, if any, as made by appellants alone, the court having granted judgment in favor of respondent upon a challenge to the evidence and the pleadings at the conclusion of appellants' case. We cannot, therefore, try the case *de novo*, nor can we inquire further than to determine whether or not appellants made a *prima facie* case to restore, determine, or establish a lost or uncertain boundary. As to this, we think they did. The opening statement of counsel, heretofore quoted, was substantially sustained by evidence produced by appellants, and there was evidence which stands undisputed to the effect that respondent, after the judgment in the former case, proceeded to build its fence at least seventeen feet north of the line which they claimed in the former trial to be the true line. If that be true—and as the evidence stands it must be assumed, appellants certainly made a *prima facie* case as to that seventeen-foot strip. They claim, however, that in fact respondent put its fence, and asserts its boundary line to be, one hundred and thirty-seven feet north of the boundary line, and there is undisputed testimony of a competent engineer to that effect.

The evidence of the engineer who made the original survey of the plat of Port Orchard City shows, *prima facie*, that many of the original stakes set by him at the corners of blocks, showing the numbers of the blocks, still stand in the original locations, and that others were found lying on the ground at the places where he originally located them. The evidence of another engineer was to the same effect, and of this other engineer that he proceeded to reestablish those corners of the blocks which were lost by reference to the stakes at the corners of blocks which were not lost, and thus located the exact boundaries of the various blocks and of the streets. These engineers thus located on the ground the location of Allison street between the blocks owned by these parties, and if Allison street as platted coincides with Allison street on the ground as located by these engineers, that is the true location of Allison street, and the center of that street, which is sixty feet wide, would be the present boundary line of the tracts owned by these respective parties, lying on either side thereof. Whether the blocks and streets as platted with reference to government monuments and official surveys will coincide with the staking or location of the blocks, and consequently the streets between the same, is another disputed question which should be determined. If they do coincide, it is conclusive. If they do not coincide and the parties bought with reference to the stakes upon the ground at the time they bought, they are bound thereby. *Turner v. Creech*, 58 Wash. 439, 108 Pac. 1084; *Campbell v. Seattle*, 59 Wash. 612, 110 Pac. 546; *Yarrow Land Co. v. Ross*, 79 Wash. 101, 139 Pac. 876; *Stokes v. Curtis*, 49 Wash. 235, 94 Pac. 1083.

We have examined with diligence and care the entire record in this case and all the cited law applicable thereto. Certainly, as to the seventeen-foot strip, appellants made a *prima facie* case that respondent has encroached and trespassed upon their land, even though the proceedings and judgment in the former case referred to should be held *res adjudicata*. This is a somewhat extreme case, but we feel

that, in the interests of justice and certainty to these parties, as well as to other parties who may own blocks in the vacated portions of the replat of Port Orchard, the true location on the ground, according to the plat of Allison street and the center line thereof, should be determined. It is our judgment, therefore, that the cause be remanded with instructions to the court to deny the motion of respondent for judgment in its favor on the evidence produced by appellants and the pleadings in the case, and to reopen the case and proceed to a final determination as in an action to establish or restore a lost or uncertain boundary under the provisions of §§ 947, 948, and 949, Rem. Code. Appellants will recover costs of the appeal.

MORRIS, MOUNT, FULLERTON, and PARKER, JJ., concur.

[No. 13610. Department Two. January 26, 1917.]

S. C. DAVIS, *Respondent*, v. MASONIC PROTECTIVE ASSOCIATION, *Appellant*.[1]

FRAUD—MISREPRESENTATIONS—LIABILITY. The evidence is insufficient to support a finding of fraud in inducing plaintiff to come to the state of Washington to solicit insurance as state agent of the Masonic Protective Association, which was contrary to the laws of the order, where there were no false statements of fact; since the plaintiff, being a Mason, was presumed to know the rules of the order, and the representation that he could make big money by coming to the state was clearly an expression of opinion.

Appeal from a judgment of the superior court for King county, Frater, J., entered March 6, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action for fraud. Reversed.

John W. Roberts, George L. Spirk, and *J. L. Runner*, for appellant.

John W. Heal, Jr., and *Max Wardall*, for respondent.

[1]Reported in 162 Pac. 516.

MOUNT, J.—This action was brought to recover damages against the defendant by reason of deceit used, inducing the plaintiff to come from Kansas to the state of Washington.

The complaint, after alleging the corporate character of the defendant, and that the plaintiff at that time lived at Newton, Kansas, states, at paragraph four, as follows:

"IV. That in the early part of June, 1915, defendant, through its officers, agents and representatives represented to said plaintiff that said defendant had recently been licensed to do business in the state of Washington; that said field was new and unworked territory of said defendant and that plaintiff could make big money by moving to Washington and becoming state agent there for said defendant and by such representations induced plaintiff to give up his business in the state of Kansas and appointed him state agent for the state of Washington with full and exclusive authority to write insurance and represent said defendant in said state."

The next paragraph alleges that the plaintiff sold his residence in Newton at a loss of $400, and came to the state of Washington in September, 1915.

Paragraph six is as follows:

"VI. That a short time after his arrival in Washington and after he had located and settled his family in Seattle, and while doing some preliminary work as said state agent for defendant, plaintiff was notified through the Grand Master of the Grand Lodge of Free and Accepted Masons of the state of Washington that he was barred from soliciting insurance for the Masonic Protective Association, defendant, herein, and should cease to do so forthwith; that by the rules and regulations governing the Masonic bodies and members of the Masonic fraternity of the state of Washington, the use of the word "Masonic" in connection with any business enterprise was prohibited and that defendant therefore could not solicit insurance from Masons residing in the state of Washington, all of which aforesaid prohibitions, defendant, its agents, officers and representatives well knew or in the exercise of reasonable caution should have

known at the time it induced plaintiff to give up his business and home in Kansas and move his family to Seattle to become its state agent."

The next paragraph is as follows:

"That the representations set forth in Paragraph IV were false and at the time the same were made said defendant, its agents and representatives knew, or in the exercise of reasonable prudence and caution should have known, that said representations were false; that plaintiff did not know and had no means of knowing that said facts were not as represented, but wholly relied and was expected by defendant to rely upon said statements and representations of defendant, its agents and representatives as to the conditions obtaining in the state of Washington."

The next paragraph of the complaint alleges certain expenses incurred by the plaintiff in moving to the state of Washington, and prays for judgment: First, for loss in selling his home, $400; expenses of moving from Kansas to Washington, $325; living and traveling expenses while in the state of Washington, $200; cost of returning to Kansas, $400; loss of time and health, humiliation, disruption of business and home, $2,500, with costs and disbursements.

In answer to this complaint, the defendant admitted its corporate capacity; admitted that the plaintiff resided in the town of Newton, Kansas, and had solicited insurance for the defendant in that vicinity, but denied every other allegation in the complaint. Upon these issues, the cause was tried to the court and a jury, and a verdict was rendered in favor of the plaintiff for $1,500, and judgment finally entered thereon. The defendant has appealed.

At the conclusion of the respondent's evidence, which was substantially as alleged in the complaint above quoted, the appellant moved for a directed verdict. This motion was denied. We think the motion should have been granted. It appears from the evidence of the respondent that he had been soliciting health and accident insurance in the state of Kansas for an agent of the defendant; that he was a sub-

agent in that state; that he at one time met the superintendent of agencies of the appellant company, and was asked if he would like to go to Washington to take the general agency of this state. The superintendent of agencies, at that time, told him there was a big, new territory out there, which had never been worked, and they had picked him to go to that state, and that he could make big money out there. The respondent, in reply to this, stated that he would think the matter over, and subsequently wrote a letter to the agent, as follows:

"Mr. Le Roy Darnold, Newton Kas.
"Western Field Mgr., May 14, 1915.
"Kansas City, Mo.

"Dear Sir and Brother:—In our conversation while in your office a short time ago you mentioned the fact that the state of Wash. was open and that I could have the state agency, and after due consideration have concluded to accept it, provided I can make satisfactory arrangements to all concerned, so would ask you to state what commission I would receive also any other information you care to give concerning the matter.

"At the present time I am unable to say just how soon would be ready to go as I have some property to dispose of and other matters which will necessarily take a little time.

"It is my intention to drive thru in a car and pick up business on the way.

"Trusting I may hear from you soon I am—Yours Fraternally S. C. Davis"

In answer, Mr. Darnold wrote a letter, dated June 16, 1915, to Mr. Davis, as follows:

"Dear Sir and Bro:—I am pleased to note by yours of the 14th inst., that you have decided to take up our work in the state of Washington, and in the meantime we will try to meet and have a talk on the work in general, and fit you out with a full line of supplies.

"We have a special proposition on that state, will allow you the entire policy fees on all business you write personally, and the difference between your contract and what you allow all your sub agents. The policy fee is $5 on the $12

policy, and $6 on the Sterling policy, and with this kind of a contract a man ort to make big money in that territory, and if he can't, he had better give up the insurance business, don't you think so?

"I am very busy today, as I have a number of claims on hand, however, before you leave we will get together, so keep in touch with me, I am

"Fraternally yours,
"LeRoy Darnold,
"Western Field Mgr."

After receiving this letter, the respondent sold some property in Newton, and came to this state. After he had been here a short time, he was informed that there was a rule of the Masonic Order in this state, as follows:

"No Mason shall exhibit any Masonic emblem upon any sign, flag or banner except in a Masonic procession, or upon any place of business or business advertisement; or use any such emblem or the words 'Masonic' or 'Masonry' in connection with any business enterprise except the publication of books, magazines or other literature."

He was also informed that, if he solicited business for the appellant in this state, he would be expelled from the order. The respondent thereupon quit, and demanded from the appellant the damages which he claims. The theory of the respondent is that he is entitled to recover by reason of deceit practiced upon him in inducing him to come to this state and appointing him as a general agent to solicit insurance within this state. It will be noticed that the only allegations of representations which induced the respondent to come to this state, which are alleged to be false, are: First, that the appellant had been recently licensed to do business in the state of Washington; second, that the field was new and unworked territory; and third, that respondent could make big money by coming to Washington and becoming state agent. The proof offered by the respondent showed that the appellant had been regularly licensed by the insurance commissioner to do business in this state. The first

representation was, therefore, true. The representation that respondent could make big money was clearly an expression of opinion, and nothing more. There was some evidence to the effect that other agents had been employed in this state, but none were authorized to do business for the appellant at the time the respondent was employed.

The respondent's case is mainly rested upon the position that appellant's officers should have known, and should have stated to the respondent, that he was not authorized to solicit business in this state, because he was a Mason, and the Masonic Order would not permit the use of the word "Masonic" in the solicitation of this class of business by a Mason. There is no allegation that any representation upon this subject was made to the respondent to induce him to come here, and there was no proof to that effect. The respondent himself was a Mason. He, of course, was presumed to know Masonic rules. When he learned of the rule, he thereupon refused to further solicit business. It is not claimed that the laws of the state prohibited the appellant from doing business, or prohibited the solicitation of business, but it is claimed that the rules of the Masonic Order in this state prohibited a Mason from using the word "Masonic" in any business, and therefore the respondent was prohibited from soliciting business. Since nothing was said, at the time of the employment, about the right of the appellant to solicit business in this state, under the rule of the order within the state, it cannot be said that this was a false or fraudulent representation, inducing the respondent to come to this state. Upon the whole record, we are satisfied that the respondent desired to come to this state. He desired to be appointed general agent of the appellant company in this state. He was given this appointment upon his own solicitation. He took his chances in coming to this state, and when he came here and found that the members of the order would not permit him to solicit business, by reason of the use of the word "Masonic," he quit his contract. Neither

the complaint nor the evidence shows a cause of action for deceit, and for that reason, the court should have directed a verdict in favor of the appellant.

The judgment appealed from is therefore reversed, and the cause ordered dismissed.

MORRIS, HOLCOMB, FULLERTON, and PARKER, JJ., concur.

[No. 13656. Department Two. January 26, 1917.]

J. W. SLAYDEN *et al.*, *Appellants*, v. CALVIN J. CARR, *as County Treasurer of Pierce County, Respondent.*[1]

FINES—DISPOSITION—STATUTES—CONSTRUCTION. The act of 1909, Rem. Code, § 4606, providing that "except as otherwise provided by law," all fines imposed for breaches of the penal statutes shall be credited to the current state school fund, supersedes all prior statutes covering the same subject-matter; since otherwise there would be nothing left upon which the section could operate.

STATUTES—TITLE AND SUBJECTS—SCHOOLS. The establishment and maintenance of the public school system are sufficiently correlated to be embraced in one act; hence the provision in the school code, which is entitled an act for the establishment and maintenance of the public school system, that fines imposed for breaches of the penal statutes shall be applied to the support of the schools, does not violate Const., art. 2, § 19, providing that no bill shall embrace more than one subject and that shall be expressed in the title.

HOLCOMB, J., dissents.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 24, 1916, upon sustaining a demurrer to the complaint, dismissing an action for an injunction. Affirmed.

Fred G. Remann, *Harry E. Phelps*, and *A. B. Bell*, for appellants.

The Attorney General and *L. L. Thompson*, *Assistant*, for respondent.

[1]Reported in 162 Pac. 529.

FULLERTON, J.—This is an action instituted by the county commissioners of Pierce county to restrain the county treasurer of that county from remitting to the state treasurer certain moneys derived from fines imposed for violations of the penal statutes. The *Attorney General*, appearing for the county treasurer, interposed a demurrer to the complaint, which the trial court sustained. The county commissioners elected to stand on the complaint; whereupon the court entered a judgment dismissing the action. The commissioners appeal.

As suggested by the foregoing statement, the sole question involved is the proper disposition of the moneys derived from fines and penalties imposed by the court for violations of the criminal statutes. It is the contention of the county commissioners that these belong to the general fund of the county where the conviction is had, while the *Attorney General* contends that they are payable to the state treasurer for the benefit of the current school fund. It is not questioned, of course, that the disposition of such funds rests solely with the legislature and that we have only to inquire what disposition the legislature has directed to be made of them. The latest enactment on the subject is found at § 9 on page 323 of the Laws of 1909. The section reads as follows:

"Except as otherwise provided by law, all sums of money derived from fines imposed for violation of orders of injunction, mandamus, and other like writs, or for contempt of court, and the net proceeds of all fines collected within the several counties of the state for breach of the penal laws, and all funds arising from the sale of lost goods and estrays, and from penalties and forfeitures, shall be paid in cash by the person collecting the same, within twenty days after the collection, to the county treasurer of the county in which the same have accrued, and shall be by him transmitted to the state treasurer, who shall place the same to the credit of the current state school fund. He shall indicate in such entry the source from which such money was derived." Rem. Code, § 4606.

Since all of the moneys in dispute were the net proceeds of fines collected in Pierce county for breaches of the penal laws, the question would present no difficulty were it not for the opening clause of the section quoted. Based on this clause, the appellants argue that the section is applicable only to moneys collected on fines imposed for breaches of the penal statutes the disposition of which is not provided for by prior statutes, and that, since prior statutes provide for the payment to the general fund of the county of moneys so collected, this money properly belongs to the general fund of the county of Pierce and not to the state.

It cannot be questioned that the prior laws did provide as the appellants contend. Since the first session of the territorial legislature, statutes in some form have been on the statute books making disposition of funds collected from the sources from which these funds were collected. The statutes have varied from time to time, and certain sessions of the legislature have seemingly enacted conflicting statutes on the same subject. These have been a subject of review in the briefs of counsel, but we shall not notice them further than to say that they have been at all times sufficiently broad to cover the entire subject-matter. We cannot, however, accept the appellants' construction of the section quoted. To give it the meaning contended for would render it entirely nugatory. There were, at the time of the passage of the act of which this section forms a part, no sums of money derived from fines imposed for the violation of the penal statutes the disposition of which was not provided for in the existing laws, and if the phrase "except as otherwise provided by law" means the statutes previously enacted and then in force, nothing was left upon which this particular section could operate. It cannot be known, it must be conceded, what was in the mind of the legislature that induced them to insert this excepting clause, but there were on the statute books statutes imposing penalties the disposition of which was specially directed, and it may be that these induced the

exception. But be this as it will, we are constrained to hold that the section supersedes all the prior statutes on the general subject enumerated. This would include statutes on the subject of fines collected for breaches of the penal laws the sources from which the money here in question was derived.

The section is a part of the code of public instruction of the state of Washington, and it is contended that the particular provision is without the scope and title of the act, and hence is in violation of § 19, art. 2, of the constitution, which provides that no bill shall embrace more than one subject, and that shall be expressed in the title. The act is entitled as follows:

"An Act establishing, providing for the maintenance of, and relating to, a general and uniform public school system for the state of Washington, providing penalties for the violation of the provisions of this act, and repealing all acts and parts of acts in conflict with the provisions of this act." Laws 1909, p. 230.

The establishment and maintenance of a uniform school system are sufficiently correlated to be permitted to be embraced in one act under the constitutional provision relied upon, and clearly the legislature has the same power to direct that funds derived from fines and penalties imposed for breaches of the penal statutes shall be applied to the support of the schools as it has to provide that funds from other sources, such, for example, as taxation, shall be so applied. We cannot think the act invalid for the reason here suggested.

The judgment is affirmed.

MORRIS, PARKER, and MOUNT, JJ., concur.

HOLCOMB, J., dissents.

[No. 13748. *En Banc.* January 26, 1917.]

THE STATE OF WASHINGTON, *Respondent*, v. POWLES & COMPANY, INCORPORATED, *Appellant*.[1]

MASTER AND SERVANT—WORKMEN'S COMPENSATION—EXTRA HAZARDOUS EMPLOYMENTS—POWERS OF INDUSTRIAL INSURANCE COMMISSION—DELEGATION OF LEGISLATIVE POWERS—STATUTES. Under Rem. Code, § 6604-2, providing that the workmen's compensation act is intended to apply to all extra hazardous occupations and that "if there be or arise" any extra hazardous occupation or work other than those enumerated, it shall come under the act and its rate of contribution be determined by the industrial insurance commission, no power is delegated to the commission to decide as a legislative determination that an occupation other than those enumerated is extra hazardous, in the absence of any express delegation of such power.

SAME — WORKMEN'S COMPENSATION — EXTRA HAZARDOUS EMPLOYMENTS—WHAT ARE. A mercantile company engaged in the commission business, dealing in fruit and produce, handled in boxes, crates, and sacks weighing less than 150 pounds, accessibly held in storerooms for immediate sale, and employing teamsters, receiving and shipping clerks, potato sorters and porters, is not engaged in an extra hazardous occupation, within the meaning of the workmen's compensation act, and the industrial insurance commission therefore has no power to recognize such a business as extra hazardous or order it to be brought under the terms of the statute.

Appeal from a judgment of the superior court for King county, Jurey, J., entered August 16, 1916, upon findings in favor of the plaintiff, in an action to recover a contribution to the accident fund provided for by the industrial insurance act, tried to the court. Reversed.

James Kiefer, for appellant.

The Attorney General and *Howard Waterman*, *Assistant* (*C. E. Arney*, of counsel), for respondent.

PARKER, J.—This action was commenced by the industrial insurance commission, in the superior court for King county, seeking recovery from the defendant of contribution to the

[1]Reported in 162 Pac. 569.

accident fund provided for in our workmen's compensation act. Trial in the superior court without a jury resulted in judgment against the defendant, from which it has appealed to this court.

Recovery is sought from appellant upon the theory that it is operating a warehouse in connection with its mercantile business and, therefore, it is required to contribute to the accident fund provided for in the workmen's compensation act, because the operation of a warehouse is the carrying on of extra hazardous work within the meaning of the act and a resolution of the commission adopted in pursuance of what it conceived to be its power under section 2 of the act (Laws 1911, p. 346), reading as follows:

"There is a hazard in all employment, but certain employments have come to be, and to be recognized as being inherently constantly dangerous. This act is intended to apply to all such inherently hazardous works and occupations, and it is the purpose to embrace all of them, which are within the legislative jurisdiction of the state, in the following enumeration, and they are intended to be embraced within the term 'extra hazardous' wherever used in this act, to wit:

"Factories, mills and workshops where machinery is used; printing, electrotyping, photo-engraving and stereotyping plants where machinery is used; foundries, blast furnaces, mines, wells, gasworks, waterworks, reduction-works, breweries, elevators, wharves, docks, dredges, smelters, powder-works; laundries operated by power; quarries; engineering works; logging, lumbering and ship-building operations; logging, street and interurban railroads; buildings being constructed, repaired, moved or demolished; telegraph, telephone, electric light or power plants or lines, steam heating or power plants, steamboats, tugs, ferries and railroads. If there be or arise any extra hazardous occupation or work other than those hereinabove enumerated, it shall come under this act, and its rate of contribution to the accident fund hereinafter established, shall be, until fixed by legislation, determined by the department hereinafter created, upon the basis of the relation which the risk involved bears to the risks classified in section 4." Rem. Code, § 6604-2.

The commission having concluded that the operation of a warehouse is an extra hazardous work and that it had power to so determine and fix the rate of contribution to the accident fund therefor, by virtue of the power conferred upon it in the concluding sentence above quoted, on May 3, 1915, adopted the following resolution:

"Whereas, It is provided by section 2 of the workmen's compensation act of the state of Washington,—

" 'If there be or arise any extra hazardous occupation or work other than those hereinabove enumerated, it shall come under this act, and its rate of contribution to the accident fund, hereinafter established, shall be, until fixed by legislation, determined by the department hereinafter created, upon the basis of the relation which the risk involved bears to the risks classified in section 4'; and Whereas, It has been demonstrated and proven that the operation of mercantile and storage warehouses and the occupations of teamsters, truck drivers, handlers of freight, auto truck drivers and helpers are extra hazardous, therefore,

"Be It Resolved, That after June 30, 1915, every employer in the state of Washington, who is engaged in extra hazardous employment under the workmen's compensation act, employing teamsters, truck drivers, handlers of freight, auto truck drivers and helpers, shall make contribution to the accident fund upon the wages or earnings of such workmen at the basic rates of his class as provided in section 4; and

"Be It Further Resolved, That all transfer companies shall hereafter make contribution to the accident fund on the wages of all their drivers of freight and drayage vehicles and their helpers, such contribution to be made at the basic rate of 2 per cent and listed in Class 21. This also includes all operations of transfer companies formerly listed in Class 6.

"Be It Further Resolved, That all firms or individuals operating storage warehouses, or warehouses in connection with mercantile establishments, operated either independently or in connection with other business shall hereafter make contribution to the accident fund on the wages of their workmen including teamsters employed in connection with said warehouse at the basic rate of 2 per cent and listed in Class 21."

It is contended in appellant's behalf that the concluding sentence of section 2 (Id., § 6604-2) of the act, above

quoted, commencing with the words "if there be or arise," amounts to an unconstitutional delegation of legislative power to the commission, in so far as that sentence may be construed as conferring upon the commission power to decide, as a legislative determination, that any "occupation or work," other than those specifically enumerated, is extra hazardous. As we proceed we shall find that the proper construction rather than the constitutionality of section 2 is determinative of this case. Now there are two powers which the commission has assumed to exercise by the adoption of its resolution. First, it determined that certain occupations are extra hazardous which are not specifically enumerated in the act as such; and second, it determined the rate of the employers' required contribution therefor to the accident fund. It is not contended that the latter is an exercise of an unconstitutionally delegated legislative power. That is, it is conceded that, as to all extra hazardous occupations which come within the act for which no contribution rate to the accident fund is prescribed by the act the rate therefor shall, until fixed by legislation, be determined by the commission "upon the basis of the relation which the risk involved bears to the risks classified in section 4." Since these quoted words, together with the provisions of § 4 (Id., § 6604-4) of the act, furnish a fair standard for determination of the proper rate of contribution in such cases, if there be any, we think it quite safe to assume, as is here conceded, that in so far as § 2 authorizes the commission to determine the rate in such cases, it does not unconstitutionally delegate legislative power to the commission. While this power to determine the rate in such cases, if there be any, is given to the commission by the express language of § 2, the power to determine what occupation or work is extra hazardous, in addition to those specifically enumerated as such, is not so given. It seems plain, therefore, that whatever power or duty the commission may have touching the ascertainment of what occupations are extra hazardous, other than those

specifically enumerated, such power or duty is only inferable from and incidental to the express power to fix the rate in such cases, if there be any.

The legislature, no doubt, has the power to determine directly, by its own enactment, what occupations are extra hazardous, as it has done by the specific enumeration in § 2 of the act. The legislature may have the power to delegate such power to the commission, accompanied by some legislative prescribed standard by which such determination shall be made; but that it could constitutionally delegate such power to the commission without prescribing some such standard, suggests, to say the least, grave doubt. We look in vain in this act for any prescribed standard by which the commission shall determine what occupation or work, other than those specifically enumerated, are extra hazardous. The line between legislative and administrative functions is often uncertain and difficult to ascertain when it comes to determining what powers may be delegated by the legislature to administrative officers. The power here assumed to be exercised by the commission, other than the power of determining the contribution rate, is manifestly very close to that line, if, indeed, it is not upon the legislative side thereof. This is a power, if existing, of possibly far reaching effect. By the determination of the commission, if it has the power here claimed, all right of the employee to seek redress in the courts from his employer by reason of the latter's negligence is taken away, and at the same time the employer is compelled to contribute to the accident fund from which employees, other than his own, may be compensated when injured; and all this regardless of the fault of any one, save as to the very few exceptions specified in the act. More, for want of a prescribed standard, it might well be argued that the commission, if its power exists as here claimed, has delegated to it the power of determination as to what occupation or work is extra hazardous to the same extent that such determination might be made by the legislature itself. These

considerations suggest grave caution on the part of the courts to attribute to the legislature an intent to delegate such far reaching power to the commission, in the absence of language in the act expressly so declaring. Plainly there is no such express declaration in this act.

So far we have had in mind only such a determination under the power here claimed as by its own making has the effect of bringing the employee and employer under the act. That is such a determination as, by the fact of its making, changes the rights, remedies and liabilities of the employer and employee, each as against the other, in the same manner and with like effect as if such change were brought about by direct legislative declaration. We think there must be here recognized a distinction between the force and effect of such a *determination* and the force and effect of the *fact* that a given occupation or work is extra hazardous. We are not prepared to say but that "there may be or arise" an extra hazardous occupation, other than those specifically enumerated, which may be so plainly within the spirit of the act that the commission should recognize it as such and determine the rate to be contributed therefor to the accident fund, and proceed with reference thereto as it is authorized to do with reference to those occupations and works specifically enumerated. This may suggest a difficult problem as to the practical workings of the law touching occupations other than those specifically enumerated, but we assume and concede, nevertheless, for the purpose of argument, that the commission does possess powers and duties to this extent. If there be or arise any such plainly hazardous occupation as to bring it under the act, we apprehend that it would come under the act regardless of whether the commission so determined or not. In other words, it would be the fact of the existence of such extra hazardous occupation and not the determination of such fact by the commission that would bring it under the act. In view, then, of the extraordinary nature and possible far reaching effect of this assumed power

on the part of the commission, the failure of the legislature to prescribe a standard by which it may be exercised, and the failure of the legislature to confer the power upon the commission by plain and unequivocal language in the act, we are constrained to hold that such power is not possessed by the commission; in any event, not in the sense that it can be exercised and have the force of a legislative determination upon the question of occupations other than those specifically enumerated being extra hazardous.

Assuming, but not deciding, that there may "be or arise" extra hazardous occupations other than those specifically enumerated which the commission under the power given it may recognize as such, but adhering to our conclusion that in no event has the commission the power to so decide, and by such decision bring under the act, as the legislature might do by its declaration, an occupation other than those specifically enumerated, we come to the question of whether or not appellant's employees are engaged in extra hazardous occupations within the meaning of the act so as to require it to contribute to the accident fund. Appellant is engaged in the commission business in the city of Seattle, dealing in fruit and produce, selling the same to retailers. Its goods are handled in boxes, crates and sacks, none of which weigh over one hundred and fifty pounds. It operates no warehouse, unless its storeroom where it holds all its goods for sale and distribution to its customers might be considered as such. All of its goods are held in its storeroom for immediate sale in such manner as to all be accessible to its salesmen with a view of readily exhibiting them to its customers as occasion may require. Its goods are brought to its store and delivered therefrom by its own teamsters to a considerable extent, as is more or less commonly done in mercantile business. A list of its employees before us in this record shows that it has two receiving clerks, one order clerk, one teamster, two potato sorters, three shipping clerks and three porters. If these employees be engaged in an extra hazardous occupa-

tion, then the employees of practically every mercantile business, even apart from any of the occupations connected therewith which might fall within the specifically enumerated classes, would be engaged in extra hazardous occupations within the meaning of the act. We cannot believe that it is within the contemplated power of the commission to recognize a business of this nature as being one whose employees are engaged in extra hazardous occupation or work. To do so would be, it seems to us, to lose sight of the distinction which the act itself makes between occupations attended with ordinary hazards and those attended with extra hazards. It is only "*extra hazardous*" occupations which are under the act. It seems quite clear to us that appellant's employees are not engaged in such an occupation. We are not deciding that the legislature might not cause such occupations as these to be brought under the act, but only that it has not done so in this act, nor has it given to the commission the power to do so.

The judgment is reversed and the action dismissed.

ELLIS, C. J., MORRIS, MAIN, MOUNT, HOLCOMB, and CHADWICK, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 13580. Department One. January 27, 1917.]

EDWARD B. CRARY *et al.*, *Appellants*, v. WILLIS G. HOPKINS, *Respondent*.[1]

FRAUD—EVIDENCE—SUFFICIENCY. A charge of fraud in a real estate transaction in representing that defendant would dedicate a street, without any intention of doing so, is not sustained by the necessary clear and convincing evidence, where one witness merely testified that he tried to buy the parcel and the defendant refused to sell it, and another witness testified that the defendant stated three or four months previously that he did not then intend to dedicate.

Appeal from a judgment of the superior court for Grays Harbor county, Albertson, J., entered January 27, 1916, upon granting a nonsuit, dismissing an action for fraud, tried to the court and a jury. Affirmed.

F. R. Conway and *F. M. Cook*, for appellants.

Hogan & Graham, for respondent.

MAIN, J.—The purpose of this action was to recover damages for fraud, alleged to have been practiced in a real estate transaction. After the issues were framed, the cause, in due time, came on for trial before the court and a jury. At the conclusion of the plaintiff's evidence, the defendant challenged the sufficiency thereof, and moved for a dismissal of the action. This motion was sustained, and a judgment of dismissal entered. From this judgment, the appeal is prosecuted.

The facts are these: On May 17, 1906, and for some time prior thereto, the respondent was the owner of two tracts of land in the city of Aberdeen, referred to in the evidence as parcel one and parcel two. Parcel one was at the end of a street of the city called Eighth avenue, and was between the end of that street and parcel two. Parcel two was without any street frontage, and the only practical way of access and egress was over parcel one. On the date mentioned, the

[1]Reported in 162 Pac. 515.

respondent sold parcel two, one-half thereof to each of two purchasers. When this sale was made, the respondent represented to the agent of the purchaser that parcel one would be opened as a street. On April 15, 1909, the appellants became the owners of all of parcel two, having on that date purchased it from the then owners. At this time, the respondent had no interest in parcel two. Before this purchase was made, it was represented to the appellants that the respondent had said that he would open a street over parcel one. Seeking to confirm this representation, inquiry was made by the appellants of the respondent, and the latter confirmed the representation which had been made that he had promised to dedicate parcel one for street purposes. On December 11, 1911, the respondent sold parcel one, and thus put it out of his power to dedicate it as a street. Before this sale was made, the respondent communicated with the appellants, and informed them that he was about to sell parcel one, and suggested that they might have a preference right to purchase if they so desired. The present action was begun on September 11, 1915. The appellants' theory of the action is that, while they knew, more than three years prior to the filing of the complaint, that the respondent would not keep his promise to dedicate, yet they did not discover, until on or about the 21st day of September, 1912, that the respondent, at the time that he made the promise to dedicate, did not then intend to perform it.

The controlling question is whether the evidence offered by the appellants shows that, when the respondent represented to them in 1909 that he would dedicate parcel one as a street, he did not then intend to make such dedication. To state it otherwise, the question is what was the state of the respondent's mind on or about May 15, 1909, when he represented to the appellants that he expected to make the dedication. The charge is fraud. It is elementary that, in order to sustain such a charge, it is necessary that it be established by evidence which is clear and convincing. If the evidence is not

such that the jury would have been justified in inferring that the respondent did not intend to keep the promise to dedicate at the time it was made, then the judgment of the trial court was right.

After a careful consideration of all the evidence in the case, we are of the opinion that the trial court properly withdrew the case from the jury. There is no evidence which would justify a finding by the jury that the fraud charged was committed. It is true that one witness testified that, for two or three years prior to 1912, he had been trying to purchase parcel one from the respondent, but this witness also testified that the respondent refused to sell it, and said "If I do offer it for sale, I will give you a chance." Another witness testified that, in June or July, 1909, he had a conversation with the respondent relative to parcel one, and that the respondent asked this witness to look at this lot and see what he thought of it. This witness also testified that the respondent, at the time, fixed a price upon parcel one, but that he did not remember what it was. This testimony would not sustain a finding that, on April 15, 1909, when the promise was made to the appellants to dedicate, the respondent did not then intend to perform his promise. The testimony of the first witness only shows that he had been trying to purchase the property and could get no satisfaction from the respondent. The testimony of the second witness, while showing that, at the time this conversation occurred, the respondent did not then intend to dedicate, does not show what his state of mind may have been three or four months previous. There is other testimony of the declarations of the respondent that he intended to make the dedication; but this line of testimony would not tend to show that his state of mind on April 15, 1909, was other than what his verbal formula indicated.

The judgment will be affirmed.

ELLIS, C. J., MORRIS, CHADWICK, and PARKER, JJ., concur.

[No. 13792. Department Two. January 27, 1917.]

In Re YESLER WAY, SEATTLE.[1]

EMINENT DOMAIN—PURPOSES—STREETS — TERMINI — LEGISLATIVE QUESTION. Condemnation for a public street cannot be objected to on the ground that the street terminates at a privately owned pier, since the location, route and termini are purely legislative questions beyond the control of the court.

SAME—BY CITY—DECISION TO CONDEMN—FINALITY. The decision of the legislative body of a city to condemn property, in a proper case, is final and cannot be reviewed by the court.

SAME—AUTHORITY—PURPOSES — "BRIDGES," "VIADUCTS" AND "APPROACHES"—STATUTES. A city having power to construct bridges and viaducts under Rem. & Bal. Code, § 7507, and to take and damage property for bridges and approaches under Id., § 7768, it may condemn the right to impose upon a street, already permanently improved, an overhead crossing reached by an inclined plane, extending partly over the street and partly over the sidewalk; since the same may properly be called either a bridge or a viaduct and the inclined plane is an "approach."

Appeal from a judgment of the superior court for King county, Dykeman, J., entered June 20, 1916, dismissing a condemnation proceeding, after a hearing before the court. Reversed.

Hugh M. Caldwell and *Robert H. Evans*, for appellant.

Saunders & Nelson, for respondents Gustavson *et al.*

Hughes, McMicken, Dovell & Ramsey, for respondent Yesler Estate, Incorporated.

HOLCOMB, J.—Seattle, a city of the first class, by an ordinance [No. 34,994] duly enacted, declared that the "public necessity, convenience and safety demand that an overhead *viaduct and bridge* be constructed along the south side of Yesler Way and over and across Railroad avenue from the westerly margin of Railroad avenue"; declared the improvement to be of special benefit to certain lands, premises

[1]Reported in 162 Pac. 536.

and other property; laid out and established the route thereof, beginning at a certain line in the west margin of First avenue south and nine feet in width along the south side of Yesler Way and terminating "with a connection with the elevated entrance to Pier No. 1 on the west side of Railroad avenue;" ordered the condemnation and the ascertainment of the compensation and damage to all persons interested and payment thereof according to law, and that the costs of the improvement be paid for by special assessment upon the property specially benefited, in the manner provided by law, all costs for the improvement not covered by the special benefits and assessments therefor to be paid from the general fund of the city.

The power to make this improvement is claimed by the city by virtue of Rem. & Bal. Code, § 7507, particularly under subdivision 12 thereof, which is as follows:

"Any such city shall have power: . . .

"(12). To construct and keep in repair bridges, viaducts, and tunnels, and to regulate the use thereof."

The power to condemn for this improvement is asserted under the provisions of Rem. & Bal. Code, § 7768, which is in part as follows:

"Every city of the first, second and third classes . . . is hereby authorized and empowered to condemn land and property . . . for streets, avenues, alleys, highways, *bridges, approaches*, . . . and for the opening and widening, widening and extending, altering and straightening of any street, avenue, alley or highway, and to damage any land or other property for any such purpose or for the purpose of making changes in the grade of any street, avenue, alley, or highway, . . . and to condemn land and other property and damage the same *for any other public use* after just compensation having been first made or paid into court for the owner in the manner prescribed by this act."

Section 7769, Rem. & Bal. Code, directs that such improvement shall be provided for by ordinance, specifying the manner of paying for the same, and that, if so ordained, the im-

provement may be paid for wholly or in part by special assessments against property specially benefited, with a proviso that "No special assessment shall be levied under authority of this act except when made for the purpose of streets, avenues, alleys, or highways or alterations thereof or changes of the grade therein, or other improvements in or adjoining the same, or for bridges, approaches," etc. Sections 7779-7798, Rem. & Bal. Code, provide the proceedings in the superior court to condemn, adjudicate the compensation and damages to all persons affected, assess the special benefits, hear objections to the special assessments, confirm or modify the special assessment roll, and enter final judgment.

The city instituted the condemnation proceedings in the superior court, which, after a hearing on the preliminary question as to a public use and necessity, dismissed the proceedings because the statute governing condemnation in such case does not contain the word "viaducts," and the court thought that the rule of strict construction applicable to eminent domain statutes, followed by this court from *Tacoma v. State*, 4 Wash. 64, 29 Pac. 847, to *State ex rel. Wauconda Inv. Co. v. Superior Court*, 68 Wash. 660, 124 Pac. 127, Ann. Cas. 1913E 1076, controlled here. The plan of the city for this improvement called for an inclined plane, nine feet in width, rising from the initial point, passing at an incline respondents' properties on the south side of Yesler Way, partly in the street proper and partly over the existing sidewalk on which the properties affected abut, attaining an elevation of thirty-two feet at the easterly margin of Railroad avenue, spanning that street and proceeding on about the same level (declining only five feet) to the termination at the elevated entrance of Pier No. 1 on the west side of that street. Pier No. 1 is private property, though used by the public for access to water carriers, and also adjoins the public street called Railroad avenue.

Great stress is laid by respondents upon the private character of the terminus of the proposed improvement. This we deem unimportant. If the proper legislative body of the city had power to order such improvement as is here contemplated, under the statutes relied upon, the questions of the location, route and termini are legislative questions purely with which courts have no concern.

The legislative body, by proper proceedings, declared the public necessity for the improvement. That, in a proper case, when the power so to do is clearly conferred, its action in so doing is final and not a reviewable question has been so often and consistently held by this court that it needs no citation. But the respondents assert that the streets upon which this improvement is to be imposed have been laid out, established and permanently improved, that there can be no public necessity for imposing an additional improvement of the character proposed, and that the contemplated use is not really public. This claim is akin to that of the question as to what power the city actually and legally has. Referring to the statutes hereinbefore quoted, it is seen that it has power to construct bridges and viaducts; that, by the eminent domain procedural statutes quoted, it has power of eminent domain to take and to damage real and other property for bridges and approaches. While strict construction of the eminent domain powers of municipal corporations is salutary and is the policy of the courts of this state as evidenced by numerous decisions, no such restrictive strict construction of the terms "viaducts" and "bridges" as was applied by the trial court has ever been intimated. "Viaduct" is defined: "A bridge-like structure . . . to carry a roadway or the like over a valley or ravine, or across another roadway." New Standard Dictionary. "Bridge" is defined as "a structure erected across a waterway, ravine, road, or the like, serving for the passage of persons, animals or vehicles," etc. New Standard Dictionary. These are the common acceptations and meanings of the words. *Argentine v. Atchison, T. & S. F. R. Co.*, 55

Kan. 730, 41 Pac. 946, 30 L. R. A. 255. No violence to the sense of the nature of the structure under consideration is done by calling it either. Furthermore, the span across Railroad avenue could be called either a bridge or a viaduct without question; the incline from the initial point is certainly an "approach"; an approach to make the bridge traversable is obviously necessary, and the city undoubtedly has the power, by reference to § 7768, *supra*, to condemn and damage land for bridges and approaches, for the public use.

The judgment is reversed, and the cause remanded for further proceedings.

MORRIS, PARKER, MOUNT, and FULLERTON, JJ., concur.

[No. 13284. Department Two. January 29, 1917.]

FARMERS STATE BANK, *Respondent*, v. M. C. GRAY, *Appellant*, HARRY GREY *et al.*, *Defendants*.[1]

APPEAL—REVIEW—EVIDENCE—WAIVER OF NONSUIT. Where defendant did not stand upon his challenge to the sufficiency of the evidence, but entered upon his case, it will be reviewed on appeal upon the entire evidence.

PRINCIPAL AND SURETY—CONSIDERATION. The consideration for a promissory note which moves to the principal is sufficient to sustain the obligation against a surety on the note.

SAME — RELEASE OF SURETY — DEALING WITH COLLATERAL. The surety upon a promissory note is not released because of improper dealings with securities, which were merely placed in the possession of the cashier of the payee in trust for the purpose of realizing upon them, upon the understanding that they would be returned if they were not realized on, which was done.

SAME—RELEASE OF SURETY—COLLATERAL—PREVENTING ACTION TO COMPEL APPLICATION. A surety on a promissory note is not released by the assurance of the attorney for the holder that the note would be paid, whereby he failed to bring an action to compel the application of the collateral, where the assurance was contingent upon realizing upon the collateral, and the condition was not fulfilled; especially where the attorney did not appear to have possession of the notes or authority to make the assurance.

[1]Reported in 162 Pac. 531.

Appeal from a judgment of the superior court for Whitman county, McCroskey, J., entered May 14, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action on promissory notes. Affirmed.

E. B. Quackenbush, for appellant.

M. S. Jamar and *H. J. Welty*, for respondent.

MAIN, J.—The purpose of this action was to recover upon two promissory notes.

The defendants were Harry Grey and wife, and M. C. Gray and wife. Judgment went against Harry Grey and wife by default. The jury returned a verdict against M. C. Gray, but in favor of Cora E. Gray, his wife. From the judgment entered upon this verdict, M. C. Gray appeals. One of the notes was in words and figures as follows:

"Pullman, Wash., Oct. 22nd. 1913.
($1,500
(No. 1659

"On the 22nd day of December, 1913, for value received, I promise to pay to the order of the Farmers State Bank at Farmers State Bank, Pullman, Washington, Fifteen Hundred Dollars with interest from date until paid, at the rate of 8 per cent per annum, payable annually.

"The makers, signers and endorsers of this note agree to an extension of same from time to time, until fully paid, waiving demand, protest or notice of protest. It is also agreed that any collateral of any kind or description whatever, which is now or may be held hereafter by said payee shall be held as security on this note as well as any demands against any of the makers, signers or endorsers of this note, due or not due. And if not paid at maturity, both interest and principal shall become immediately due and collectible at the option of the holder of this note. Harry Grey
"P. O..... M. C. Gray"

The other note only differed from this one in the date, time when due, and the amount. Upon the trial, the respondent introduced in evidence the two notes and rested. The appellant thereupon moved for a directed verdict. This motion

was denied. The basis for this motion was the claim that the notes were nonnegotiable, and therefore their mere introduction in evidence without proof of a consideration did not make a *prima facie* case. It is claimed that that provision of the note relating to the manner in which the payee might use any collateral that was deposited to support the notes, renders them nonnegotiable. It will be here assumed, but not decided, that the notes were nonnegotiable. It will also be assumed that a nonnegotiable note which recites that it was given for "value received" does not, *prima facie*, establish that it was given for a consideration, but that a consideration must be proven before a cause of action is established.

At the conclusion of the respondent's case in chief, there was no proof of consideration. The appellant, however, did not stand upon his motion. At the conclusion of all the evidence, there was proof that the consideration for the notes was a loan to Harry Grey. The appellant not having stood upon his motion, the case will thereafter be reviewed upon the entire testimony. *Ryan v. Lambert*, 49 Wash. 649, 96 Pac. 232; *Parker v. Washington Tug & Barge Co.*, 85 Wash. 575, 148 Pac. 896.

It is contended that, if the notes are nonnegotiable, M. C. Gray was only a surety, and that the evidence not showing that he received any of the consideration, an action as to him must fail; but the rule is, in case of a surety, that the consideration which moves to the principal is sufficient to sustain the obligation of the surety. Pingrey, Suretyship and Guaranty (2d ed.), § 35; Brandt, Suretyship and Guaranty (3d ed.), § 2.

The appellant seeks to avoid liability on the notes, because, as he claims, (a) the respondent, through its cashier, entered into a conspiracy relative to certain collateral, which was detrimental to his interests; (b) the attorney for the bank assured him that the notes would be paid out of the proceeds of collateral mentioned, on a day certain, and relying upon this assurance, he did not institute an action for

the purpose of requiring that the collateral, or the proceeds thereof, be applied upon the notes; and (c) the attorney for the bank assured him that the notes would be paid. The facts which gave rise to this contention may be summarized as follows:

Harry Grey, some time prior to the transaction here in controversy, transferred to one Charles M. Chamberlain certain notes and mortgages, referred to in the evidence as securities, to the amount of approximately sixteen thousand dollars. Chamberlain, after receiving these, hypothecated them with a bank in Spokane. M. S. Jamar was the attorney for Harry Grey, and also one of the attorneys for the respondent in this action. After the securities had been transferred to Chamberlain, Grey took the position that he had been overreached, and Chamberlain agreed that, if Grey would pay something like four thousand dollars to the bank in which the securities were deposited, he would return them to him. Among the securities was a note for nine thousand two hundred dollars, secured by a mortgage upon a section or more of land in Alberta, Canada. This note was the obligation of one S. L. Lee, who resided in Canada. Chamberlain being willing to return the securities if the sum mentioned was paid to him, he turned them over to the cashier of the respondent bank, who, with one or two others, went to Canada for the purpose of seeing Lee and realizing upon the note and mortgage, the thought being to secure enough money from Lee to pay the demand of Chamberlain, and also sufficient to meet Harry Grey's obligation to the respondent bank. When the parties reached Canada and interviewed Lee, they were immediately told by him that he repudiated the obligation and already had instituted an action for the purpose of cancelling the note and mortgage, because they had been secured from him by fraud. The parties returned to the state of Washington, and the note and mortgage, together with the other securities, were returned to Chamberlain.

The appellant claims that he is released from his obligation upon the notes in this action because of the manner in which the collateral received from Chamberlain was dealt with. This contention is without substantial merit, and was properly by the trial court withdrawn from the consideration of the jury. The collateral was in the possession of the cashier of the respondent in trust for the purpose specified, with the promise that if it were not realized upon it should be returned. We find no evidence of a conspiracy to defeat the rights of M. C. Gray. Neither was the appellant prejudiced by reason of the fact that he failed to bring an action, relying upon the assurance of the respondent's attorney that the notes would be paid. The conversation in which this assurance is asserted to have been given was while the cashier of the bank was in Canada, and was to the effect that, if the securities were realized upon, the notes held by the bank against Harry Grey and M. C. Gray, which are the basis of this action, would be paid. Nothing was received upon the notes, and it was only upon this contingency that the assurance was given. There is also some contention that the attorney for the bank in this action stated that the notes would be paid in any event. If such a statement were made, it was undoubtedly not made in his capacity as attorney for the bank, but in his capacity as attorney for Harry Grey. It may well be doubted whether Jamar, at the time the conversation is alleged to have taken place, was the attorney for the bank as far as concerns the notes here involved. He did not then have possession of the notes, and had not been employed for the purpose of instituting an action upon them.

The judgment will be affirmed.

MORRIS, PARKER, and HOLCOMB, JJ., concur.

[No. 13553. Department One. January 29, 1917.]

MALCOLM MORRISON, *Respondent*, v. CONLEY TAXICAB COMPANY, *Appellant*.[1]

MUNICIPAL CORPORATIONS—USE OF STREETS — AUTOMOBILES — COLLISION—CONTRIBUTORY NEGLIGENCE. An employee of a street car company required to work in the line of traffic in a street, clearing snow and ice from the rails at a switch, is not guilty of contributory negligence in failing to keep a lookout, where he was struck by an automobile while his back was turned, and there was evidence that no horn was blown, the automobile lamps were not lit, and the car could have been stopped within seven or eight feet if the driver had seen the plaintiff.

Appeal from a judgment of the superior court for Spokane county, Edward H. Wright, J., entered February 1, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through a collision with an automobile. Affirmed.

John M. Gleeson, for appellant.

Don F. Kizer, for respondent.

CHADWICK, J.—At about half past six o'clock in the morning of December 28, 1914, plaintiff was struck by an automobile owned by appellant. Plaintiff was employed by the Spokane Street Railway Company in sweeping snow from the car tracks on Monroe street, a few feet north of the intersection of Bridge street. There had been a new fall of about six inches of snow during the night, and a snow plow had been driven over the track. It was the duty of the plaintiff to sweep the rail clear and pick out the ice and snow from around the switch tongue. While engaged in his work, he was facing north. The car approached from the south. Just before he was struck, he was stooping over, engaged in clearing the switch tongue. He raised himself to his full height, and was almost immediately struck

[1]Reported in 162 Pac. 365.

by the car. There is sufficient in the record to warrant the finding of the jury that no horn was sounded, and it was possible for the jury to find, also, that the lamps on the automobile were not lit.

Appellant relies upon that line of cases, of which *Jones v. Wiese*, 88 Wash. 356, 153 Pac. 330, is a type, holding that it is incumbent upon a pedestrian to take some care for his own safety, and that if he negligently puts himself in the way of traffic, and is injured, his injury will be attributed to his own negligence, and a recovery denied him.

Respondent was on the street at a time when there was but very little traffic. His labor demanded that he work on the side of the street that was in the path of traffic. The driver of the automobile might have seen him in ample time to stop his machine. He says he could have stopped it in seven or eight feet at the rate he was going, but that he did not see respondent.

We think the holding of the court in *Lewis v. Seattle Taxicab Co.*, 72 Wash. 320, 130 Pac. 341, is conclusive of respondent's right to recover:

"The degree of care required of such a person of course varies with the circumstances. It depends largely upon the place and upon the condition of the street; whether the street is crowded with traffic or comparatively free therefrom; whether he enters the street at a place usually used by travelers on foot, and perhaps on many other conditions, but the degree of care required is ordinary care under the circumstances, and this as we say may be vastly different from ordinary care with reference to crossing fixed tracks upon which railway or street cars are operated."

See, also *Budman v. Seattle Elec. Co.*, 61 Wash. 281, 112 Pac. 356; *Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 892; *Mickelson v. Fischer*, 81 Wash. 423, 142 Pac. 1160.

Exceptions are taken to some of the court's instructions, but we find no prejudicial error in them.

Affirmed.

ELLIS, C. J., MORRIS, MAIN, and FULLERTON, JJ., concur.

[No. 13596. Department One. January 29, 1917.]

E. M. RAMPON, *Respondent*, v. WASHINGTON WATER POWER COMPANY, *Appellant*.[1]

MUNICIPAL CORPORATIONS—USE OF STREETS—CONTRIBUTORY NEGLIGENCE—TRAFFIC ORDINANCE—VIOLATION. Failure to observe a traffic ordinance providing that vehicles, in passing, shall keep as near the right hand curb as possible, does not render one guilty of contributory negligence, *per se*, in driving into an obstruction near the center of the street in the nighttime, where there was no passing traffic and no injury resulted to any one for whose benefit the ordinance was passed.

Appeal from a judgment of the superior court for Spokane county, Linn, J., entered April 8, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action in tort. Affirmed.

Post, Russell, Carey & Higgins, for appellant.

Mulligan & Bardsley and *Robertson & Miller* for respondent.

CHADWICK, J.—The appellant operates a double track street railway system in the city of Spokane. It had made an excavation between the rails and for a short distance on either side of its track at the intersection of Post street and Riverside avenue. The dirt from the excavation had been piled on the south side of the south track. On the night of November 8, 1915, at the hour of about 1:30 in the morning, plaintiff left his place of business in company with others to go to his home. He drove his machine west along Riverside avenue a little to the north of the north rail of the north track. It was raining hard and there was some fog. Plaintiff was driving his car at a speed estimated at from seven to fifteen miles an hour. The street car company had placed lights upon the pile of dirt which had

[1]Reported in 162 Pac. 514.

been excavated so as to protect traffic going east on Riverside avenue. There were no danger signals on the north side of the track, but there was a street lamp at the intersection of the streets, and an electrolier at one of the street corners. The excavation, which was from eight to twelve inches deep, appeared dark, and plaintiff drove into it assuming it to be water. The car was so damaged that a verdict in the sum of $208 is not challenged as excessive.

The jury found with plaintiff on the issues of negligence, but it is contended that plaintiff cannot recover because of his own negligence which contributed to the injury.

Appellant relies on that part of section 24 of the Spokane Traffic Ordinance, No. C1832, which provides: "A vehicle, except when passing a vehicle ahead, shall habitually keep as near the right-hand curb as possible." The evidence shows, without controversy, that Riverside avenue is a very wide street, and that there was an intervening space between the north track and the curb of approximately thirty feet. Appellant insists, inasmuch as respondent was not driving as near the curb as possible, that he is guilty of contributory negligence, citing many decisions of this court to the effect that one who violates a city traffic ordinance is negligent; that respondent's nonobservance of the rule of the road is negligence *per se*, citing: *Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 892; *Ludwigs v. Dumas*, 72 Wash. 68, 129 Pac. 903; *Mickelson v. Fischer*, 81 Wash. 423, 142 Pac. 1160; *Johnson v. Heitman*, 88 Wash. 595, 153 Pac. 331.

But the authority of these cases and the principle relied on will not avail appellant. They are, without exception, cases where vehicles have collided one with the other or with pedestrians. The object of the traffic ordinance is to protect pedestrians and vehicles and to avoid collisions. It cannot be applied, without doing violence to fundamental principles, to the facts of the case at bar. We have held

that similar ordinances had no application unless the one invoking the ordinance can say that the ordinance was enacted for his benefit. Wherefore, it has been frequently held that it is not negligence *per se* for a person to drive at an unlawful rate of speed, or upon the wrong side of the street, if the nonobservance of the traffic ordinance did not result in injury to the one for whose benefit it had been enacted. *Segerstrom v. Lawrence*, 64 Wash. 245, 116 Pac. 876; *Beeman v. Puget Sound Traction, Light & Power Co.*, 79 Wash. 137, 139 Pac. 1087; *Mickelson v. Fischer, supra.*

With no passing traffic, respondent was within his lawful right when he drove his car on the open unoccupied street at any place best suiting his convenience, so long as he followed a way to the north of the north track. Appellant was clearly negligent. In fact, we do not understand that its negligence is seriously denied. Its act was the efficient cause without which the accident would not have happened.

We find no merit in the plea of contributory negligence, and the judgment is affirmed.

ELLIS, C. J., MORRIS, MAIN, and FULLERTON, JJ., concur.

[No. 13668. Department Two. January 30, 1917.]

R. D. SMITH, *Appellant*, v. J. P. DRISCOLL *et al.*, *Respondents*.[1]

PLEADING—COMPLAINT—DESIGNATION OF ACTION. Where the facts stated in a complaint entitled the plaintiff to relief, it is immaterial by what name the action was called.

PHYSICIANS AND SURGEONS—PRIVILEGED COMMUNICATIONS—LIABILITY. A physician is not liable for disclosing confidential communications by testifying on the witness stand, if the testimony complained of was admissible in the case in which it was given and was relevant and pertinent to the issues; nor if compelled to give the testimony by rulings of the court.

SAME—PLEADING—COMPLAINT. In such a case, a complaint for damages is demurrable where it fails to negative the *prima facie* presumption that the testimony was privileged by alleging that the statements complained of were not admissible and were not relevant or pertinent to the issues; or where it shows that the testimony was given in response to questions in obedience to rulings of the court.

Appeal from a judgment of the superior court for Franklin county, Linn, J., entered May 9, 1916, upon sustaining a demurrer to the complaint, dismissing an action for slander. Affirmed.

Davis & Johnson, for appellant.

Driscoll & Leonard, for respondents.

WEBSTER, J.—Appellant instituted this action against respondents, who are licensed and practicing physicians and surgeons, to recover damages for an alleged wrongful publication and disclosure of confidential information acquired by them in their professional capacity. From a judgment upon a demurrer to the complaint dismissing the action, this appeal is prosecuted.

[1]Reported in 162 Pac. 572.

The portion of the complaint necessary to an understanding of this opinion reads as follows:

"That on or about the 11th day of March, 1916, the respondents and each of them slandered the plaintiff as follows, to wit: That the defendants and each of them, as witnesses in the case entitled F. P. Leonard v. R. D. Smith, in justice court in and for Pasco precinct, Franklin county, Washington, before A. F. Wehe, justice, testified over the timely and strenuous objection of the plaintiff as to the facts, information and communications having come to their knowledge in their capacity as physicians and surgeons, having been gained in attending the plaintiff, such information being necessary to enable the said defendants to prescribe for the plaintiff; that the words uttered and published by the defendant while so testifying and over the objections of the plaintiff were——"

We shall not go into the question suggested in respondents' brief that the action is improperly designated as one for slander. If the facts set forth in the complaint entitle appellant to relief, it is wholly immaterial by what name the action is called. Neither is it necessary to pursue at length the inquiry of whether a cause of action lies in favor of a patient against a physician for wrongfully divulging confidential communications. For the purposes of what we shall say, it will be assumed that, for so palpable a wrong, the law provides a remedy.

As we view the record, however, this case must turn on a question of pleading. It affirmatively appears from the complaint that the statements relied upon for recovery in this case were made by respondents while testifying as witnesses in the trial of a cause in a court of justice. The question presented, therefore, is not the naked one of whether a physician is liable in damages at the suit of a patient for wrongfully divulging confidential communications, but the precise question is this: Is a physician, who, while testifying as a witness in the course of a judicial proceeding, discloses confidential communications made to him or profes-

sional information acquired by him while prescribing for a patient, liable in damages to the patient for so testifying? This question cannot be answered categorically. He may or he may not be liable, depending upon the facts of the particular case.

While we have been unable to find any cases directly in point, the applicable principles of law are not difficult to discover. To the ordinary mind it would seem that a physician while testifying in a court of justice is in the same situation as any other witness, and his rights and liabilities are to be determined by the same legal standards that are applied to a witness who is not a physician. We can conceive of no possible reason why the protection which the law, in the interest of a due administration of justice and upon considerations of sound public policy places about witnesses generally, should be denied to a particular witness merely because he is a physician. If this immunity is withdrawn in his case, surely the situation of the physician as a witness is not an enviable one. If he is interrogated and required by the court to answer concerning confidential communications in his professional keeping and does so, he will be rewarded for his obedience to the law by being mulcted in damages to the aggrieved patient. If, on the other hand, he considers it to be his paramount duty to preserve in its integrity his obligation to his patient and refuses to testify, he will be rewarded for his professional loyalty by being committed to jail. Manifestly no such barbarous rule would be tolerated by any system of civilized jurisprudence.

While the question of the civil liability of a witness for statements made by him while on the witness stand usually arises in cases of slander, there is no reason to believe that the same immunity is not enjoyed by a physician while testifying, subject to this qualification, if it may be said to be such: Where a lay witness is sought to be held liable as for slander for defamatory utterances made by him while testi-

fying in court, in addition to showing that the privilege of the occasion was abused, it must also be shown that the statements complained of were false and malicious; while in an action against a physician for divulging confidential information when testifying in the course of a judicial proceeding, it is necessary only to show that the privilege of the witness was abused. This qualification is not based upon any difference in the degree of protection afforded witnesses, but arises because of the difference in the causes of action themselves. We must look, therefore, to the cases of libel and slander to ascertain the rule of immunity from civil liability which the law grants to witnesses generally. And the rule most favorable to appellant is the one clearly stated by Chief Justice Shaw in *Hoar v. Wood*, 3 Met. 193, in this language:

"Then we take the rule to be well settled by the authorities, that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere, would import malice and be actionable in themselves, are not actionable, if they are applicable and pertinent to the subject of inquiry. The question, therefore, in such cases is not whether the words spoken are true, nor whether they are actionable in themselves, but whether they were spoken in the course of judicial proceedings, and whether they were relevant and pertinent to the cause or subject of inquiry."

This statement of the law is approved and adopted by this court in *Abbott v. National Bank of Commerce*, 20 Wash. 552, 56 Pac. 376, and *Miller v. Gust*, 71 Wash. 139, 127 Pac. 845.

It will be observed, therefore, that the liability of the witness generally depends upon whether the testimony complained of was relevant and pertinent to the issues in the case in which the witness was testifying. If it was relevant and pertinent, he is not liable. If it was not, he is. Logical relevancy, however, does not necessarily render proposed testimony admissible. A physician is not permitted to dis-

close from the witness stand the communications of his patient, made in confidence, merely because the information would be relevant and pertinent to the issues involved. Before such testimony may be given, it also must be admissible in the particular case. The important issue, therefore, in an action against a physician for divulging confidential communications while testifying in the trial of a case, is whether the testimony complained of was admissible in the case in which it was given and was relevant and pertinent to the issues. Accompanying this rule, it is held that all testimony given by a witness in the course of judicial proceedings is *prima facie* privileged. This rule seems to arise out of the presumption of regularity which attaches in favor of judicial proceedings. In view of these principles of substantive law, this case falls within the rule of pleading, that, if from facts affirmatively set forth a presumption of law arises the effect of which would be to bar a recovery, in order to state a cause of action the presumption must be negatived. *Miller v. Gust, supra; Cooper v. Phipps*, 24 Ore. 357, 33 Pac. 985, 22 L. R. A. 836; *Liles v. Gaster*, 42 Ohio St. 631; *Hutchinson v. Lewis*, 75 Ind. 55.

The complaint here does not set forth the nature of the action in which the offending testimony was given, nor does it state what the issues were, nor is it in any manner alleged that the statements complained of were not admissible in the case or were not relevant and material to the issues, whatever they may have been. In short, it contains no allegations negativing the effect of the presumption of nonliability. Not only does the complaint fail to negative the *prima facie* presumption of privilege, but, on the contrary, it alleges that the statements complained of were made over the strenuous and timely objection of appellant. This allegation invites the inference that the testimony was given in response to questions and in obedience to the ruling of the court, in which event respondents would not be liable, even though the testimony were both inadmissible and irrelevant.

For these reasons, we conclude that the complaint fails to state a cause of action, and the demurrer was properly sustained.

Affirmed.

MORRIS, FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 13514. Department One. January 31, 1917.]

ERNEST P. MARKS *et al.*, *Respondents*, v. B. F. REED *et al.*, *Appellants*.[1]

PARTNERSHIP—CROPPING CONTRACT—CONSTRUCTION. Under a contract of partnership by which M. and R. were to be half partners in a crop, M. to put in his work and R. to furnish a man against him, and to have a reasonable price for the use of his horses and machinery and for boarding the men, M. was entitled to the reasonable value of his labor, but not for his own board while working for the firm.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered August 10, 1915, upon findings in favor of the plaintiffs, in an action for an accounting, tried to the court. Modified.

Bogle, Graves, Merritt & Bogle and *Hovey & Hale*, for appellants.

E. K. Brown, for respondents.

PER CURIAM.—Action for an accounting between copartners. The following three items only are in dispute: The amount allowed against the partnership for the labor of appellant E. P. Marks, the amount allowed for the use of horses furnished by him, and the amount allowed for boarding himself while working for the partnership.

The contract of partnership, according to the testimony of Marks, which is not disputed, is as follows:

[1]Reported in 162 Pac. 546.

"Reed said, 'I will go in with you as half partner; half the crop, half the expense, reasonable price for horse hire and board.' My work would go in if he [Reed] would furnish a man against me. I was to be paid a reasonable price for the use of my horses and machinery and for boarding the men."

It is not contended that Reed furnished a man to offset Marks' work. Therefore, under the contract, Marks was entitled to the reasonable value of his labor. The amount allowed by the lower court is reasonable and amply supported by the evidence. The amount allowed for the use of horses furnished to the partnership by Marks, while apparently large, is within the evidence, and the basis adopted by the trial court for ascertaining the amount was correct. No evidence upon this question was introduced by appellant, and if we should undertake to reduce the amount, our action would be purely arbitrary.

The claim of Marks to have allowed against the partnership the reasonable value of boarding himself while working for the firm is not within the terms of the contract, and no allowance therefor should have been made. We find the amount allowed for this item to have been $635.40. The judgment will be modified to that extent, and the cause will be remanded with direction to deduct from the total amount allowed Marks against the partnership the sum of $635.40, and enter judgment accordingly. Appellant will recover costs in this court.

[No. 13670. Department One. February 1, 1917.]

S. A. POOLMAN *et al.*, *Appellants*, v. W. J. LANGDON *et al.*, *Respondents*.[1]

DRAINS—ASSESSMENTS—CONCLUSIVENESS—REASSESSMENTS — JUDGMENT—RES JUDICATA—MATTERS CONCLUDED. Under Rem. & Bal. Code, § 4137, providing that the jury in proceedings to establish a drainage system, shall ascertain the maximum amount of benefits to be derived by each landowner, the finding of the jury is conclusive that the property was not benefited to a greater extent; and a judgment showing that the full amount of the original assessment was collected is *res adjudicata* and a bar to a proceeding for a supplemental assessment to cover a deficiency, the improvement having cost more than the original estimate, and more than the amount of the award of the jury.

SAME — ASSESSMENTS — REASSESSMENTS — STATUTES — VESTED RIGHTS. Rem. & Bal. Code, § 4155, authorizing a supplemental assessment for a drainage district where the amount realized from the original assessment did not prove sufficient to complete the drainage system, merely authorizes a supplemental assessment for the cost of constructing the original improvement, if the amount of the deficiency plus the amount of the original assessment does not exceed the amount of the maximum benefits fixed by the jury; since it would be unconstitutional as impairing vested rights if construed to authorize an assessment in excess of the maximum benefits as fixed by the jury.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 10, 1916, upon sustaining a demurrer to the petition, dismissing proceedings for the levying of a supplemental assessment upon property within a drainage district. Reversed.

R. J. Burglehaus and *Bates, Peer & Peterson*, for appellants.

F. G. Remann, Harry Phelps, and *Gordon & Easterday*, for respondents.

WEBSTER, J.—Appellants, as the board of commissioners of drainage district No. 11, in Pierce county, instituted this

[1]Reported in 162 Pac. 578.

proceeding in the superior court for the purpose of levying a supplemental special assessment upon the lands embraced within the district, to cover a portion of the cost of a system of drainage which theretofore had been constructed in the district. After alleging the organization of the district and the election and qualification of appellants as the board of commissioners thereof, the petition sets forth that, on the 18th day of September, 1913, a jury was empaneled in the superior court of Pierce county for the purpose of assessing benefits and damages to lands benefited and damaged within the district by reason of the construction of a proposed drainage improvement; that thereafter the jury returned its verdict, finding that the aggregate amount of benefits to the lands in the district arising by virtue of the improvement would be $18,175.75, and this verdict was thereafter approved and confirmed by the court and a decree in accordance therewith was duly entered; that, in pursuance thereof, the work of constructing the improvement was begun in accordance with the original plans and specifications therefor, and the same had been completed in strict accordance therewith; that, during the progress of construction and when the improvement was about one-half completed, the amount of the original assessment and levy for the construction thereof, to wit, $16,614, became exhausted and no funds remained with which to pay for completing the work; whereupon appellants, as the board of commissioners aforesaid, issued warrants to cover the deficiency, amounting to the sum of $16,198.29, and to provide for the payment of these warrants, apportioned the amount thereof to the lands in the district upon the basis of the original assessment, and certified these assessments to the auditor and assessor of Pierce county, who caused the same to be spread upon the tax rolls in addition to the original assessments against the lands; that instead of the improvement costing the sum of $16,614, the amount of the original estimate and assessment, it in

fact cost the sum of $32,812.29, and therefore it became necessary to levy a supplemental assessment against the lands in order to provide funds with which to retire the warrants which had been issued for the deficiency; that the maximum amount of benefits accruing to the lands embraced within the district by virtue of the improvement, as found by the jury and confirmed by the court, was the sum of $18,175.75, but that the actual maximum benefits to the lands, in truth and in fact, aggregated the sum of $103,843.50; and to the end that the fair and just cost of the completed improvement might be proportionately levied and assessed against the lands in the district in proportion to the benefits received from the improvement, a supplemental assessment was required; that appellants had caused a reestimate of the benefits to be made, together with a proposed supplemental assessment against the lands; and then sets forth a list of owners, together with a description of their lands and the respective amounts theretofore levied against the same, and the additional amounts which it is proposed to assess each tract thereof in this supplemental proceeding, and prays that a jury be empaneled to again assess the benefits to the lands arising from the construction of the drainage improvement and to apportion the amount of the deficit to the lands within the district. To this petition, respondents interposed a demurrer, upon the ground that the petition failed to state facts sufficient to constitute a cause of action. The demurrer was sustained and appellants declined to plead further; whereupon the petition was dismissed. From the order and judgment sustaining the demurrer and dismissing the petition, this appeal is prosecuted.

Respondents, in support of the action of the lower court, contend that there is no authority under the statutes of this state for this supplemental assessment; that the maximum amount of benefits per acre to be derived by each landowner within the district from the construction of the improvement having been ascertained by the jury and confirmed by the

decree of the court in the original proceeding, that question is *res adjudicata* and cannot again be inquired into. The original act providing for the establishment and organization of drainage districts (Laws 1895, p. 271; Rem. & Bal. Code, § 4187 *et seq.*), after providing for the organization of such districts and for the election of three commissioners who shall be the district authorities, provides that, when it is desired to prosecute the construction of a system of drainage, the district, by and through its board of commissioners, shall file a petition in the superior court of the county in which the district is located, setting forth therein the route and termini of the system with a complete description thereof, together with specifications for its construction with all necessary plats and plans thereof, together with the estimated cost thereof, the names of the landowners whose lands are to be benefited by the improvement, the number of acres owned by each landowner, and the maximum amount of benefits to be derived by each from the construction of the proposed improvement, and that the same will be conducive to the public health, convenience and welfare, and will increase the value of all the property affected for the purposes of public revenue. It then provides for a preliminary determination by the court of certain questions, and if this determination is favorable to the petitioners, it provides that a jury shall be impaneled to ascertain, among other things, the maximum amount of benefits arising to the property of the district by virtue of the contemplated improvement. Upon a return of the verdict of the jury, the same shall be recorded as in other cases, and a decree shall be entered in accordance therewith. The petition in this case sets forth that this statutory procedure was adopted and pursued in the original proceeding, and that the jury found that the maximum amount of benefits accruing to the lands embraced within the district by virtue of the improvement would be $18,175.75, and that a decree of the court was entered in accordance therewith. It is now sought to reopen the question

of the maximum amount of benefits accruing to the lands in the district by virtue of the construction of the drainage system, and to have another jury empaneled for the purpose of determining that question as the basis for the proposed supplemental assessment.

Appellants rely upon the amending act of 1907, relating to taxation of property benefited by systems of drainage (Laws 1907, p. 669; Rem. & Bal. Code, § 4155), as authorizing the supplemental assessment, and they rely particularly upon that portion thereof which reads as follows:

"*Provided further*, that where the amount realized from the original assessment and tax shall not prove sufficient to complete the original plans and specifications of any drainage system, alterations, extensions or changes therein, for which the said original assessment was made, the board of commissioners of said district shall make such further assessment as may be necessary to complete said system according to the original plans and specifications, which assessment shall be made and collected in the manner provided in this section for the original assessment."

We will first notice the question of what is the effect of the verdict and decree in the original proceeding, and, in the light of our conclusion upon that question, will consider the statute upon which appellants rely. It must be borne in mind that the original act does not provide that the jury shall determine merely whether the various tracts of land embraced within the district will be benefited by the improvement to the extent of the assessment proposed to be levied thereon, but provides that the jury shall ascertain the *maximum amount of benefits per acre to be derived by each landowner from the construction of the proposed improvement.*

Webster's New International Dictionary defines the adjective "maximum" as being "the greatest in quantity or highest in degree attainable or attained." Also as "the greatest or highest allowed by law or authority." Therefore, when the jury found that the maximum amount of

benefits accruing to the lands within the district by virtue of the construction of the proposed improvement would be $18,175.75, it in effect found that that sum was the highest and greatest amount of benefits which would accrue to the land by virtue of the improvement. In other words, it was a finding that the lands would be benefited by the construction of the improvement in question to the extent of $18,175.75, and no more. It is apparent that the jury did not confine its inquiry to the question of whether the lands would be benefited merely to the extent of the proposed assessment sought to be levied against it, for the reason that the estimated cost of the improvement was $16,614, while the amount of the benefits found by the jury was $18,175.75. There is no escaping the conclusion that the jury did exactly what the law required it to do, viz., ascertained and fixed the *maximum* amount of benefits. It also appears that the drainage system was constructed in strict accordance with the original plans and specifications therefor; that is, that the improvement as actually completed was the very improvement originally contemplated. It would seem, therefore, on the plainest of elementary principles, that the decree in the original proceeding was a final and conclusive determination of the precise question sought to be reopened to fresh litigation in this proceeding. Page and Jones on Taxation by Assessment, vol. 2, § 991, announces the rule in the following language:

"In a proceeding to levy a supplemental assessment, the original judgment of confirmation is not a bar to such proceeding if it shows that the original assessment was for less than the full amount of the benefits conferred upon the property by the improvement. In such cases, the original judgment is conclusive as to the apportionment of the benefits upon the various tracts of property assessed. If the original judgment of confirmation shows that the full amount of benefits was collected in the original assessment, such judgment is a bar to a proceeding for a supplemental assessment."

This statement of the rule is supported by numerous cases, and we shall content ourselves by citing the following: *East Hoquiam Co. v. Hoquiam*, 90 Wash. 210, 155 Pac. 754; *Greeley v. Cicero*, 148 Ill. 632, 36 N. E. 603; *Cicero v. Green*, 211 Ill. 241, 71 N. E. 884; *Wickett v. Cicero*, 152 Ill. 575, 38 N. E. 909; *St. Louis v. Ranken*, 96 Mo. 497, 9 S. W. 910; *St. Louis v. Excelsior Brewing Co.*, 96 Mo. 677, 10 S. W. 477; *Chicago & Northwestern R. Co. v. People ex rel. Miller*, 83 Ill. 467; *Sheriffs v. Chicago*, 213 Ill. 620, 73 N. E. 367; *People ex rel. Ijams v. Meyers*, 124 Ill. 95, 16 N. E. 89.

It is also well settled that, where confirmation of an assessment roll is had by proceedings in court and a decree of confirmation is rendered, such decree is controlled as to its effect and validity by the principles of law applicable to judgments in general. 2 Page and Jones, Taxation by Assessment, § 927.

The jury, under the original drainage act, being required to find the maximum amount of benefits per acre to be derived by each of the landowners within the district from the construction of the drainage improvement, and in the original proceeding having done so, and the court having entered its decree thereon and this decree not having been modified or reversed, the case falls within the well settled doctrine of *res adjudicata*.

This conclusion in no way trenches upon, nor is it in any way in conflict with, the numerous decisions of this court holding to the rule that, where upon appeal to this court a judgment confirming an assessment roll is modified or reversed in whole or in part and the cause is remanded for further proceedings, the findings of the assessing authorities in the original roll are not conclusive upon the reassessment, for the reason that, the judgment appealed from having been set aside, the case is in a similar situation to one where a new trial has been granted and the question of the amount of benefits to the property affected is an open one. In those

cases the original judgment is not a bar, for the very evident reason that it has been set aside.

Nor is our conclusion out of harmony with the holdings of this court in cases involving supplemental assessments, that the finding of the amount of benefits to the property in the original proceeding is not conclusive in the supplemental proceeding, for the reason that the finding in the original proceeding is merely to the effect that the property assessed is benefited to the extent of the proposed assessment against it, and such a finding is in no way inconsistent with a subsequent finding that the property is benefited to a much greater extent than the amount of the original assessment. A determination that property is benefited to the extent of a proposed assessment thereon is perfectly consistent with a subsequent finding that the benefits conferred upon the property by the improvement in question are largely in excess of the amount of the original assessment. In cases of reassessment after reversal or modification of the original judgment, the original assessment is not controlling for the reason that the original judgment is vacated and set aside; and in the cases of supplemental assessments where this court has dealt with the question, the judgment in the original proceeding is not controlling for the reason that the maximum amount of benefits to the property assessed is not determined by the original assessment proceeding.

Appellants cite and earnestly rely upon the case of *State ex rel. Conner v. Superior Court*, 81 Wash. 480, 143 Pac. 112, and while it must be admitted that some of the language in that opinion lends support to appellants' contention, an analysis of the opinion clearly shows that these expressions are dictum. That they are so is made plain by the concluding paragraph of the opinion, on page 493, wherein the court expressly declined to pass upon the precise question presented in the case now before us. In the *Conner* case, the supplemental assessment was made under the provisions of Laws 1913, p. 267 (3 Rem. & Bal. Code, § 4107), and the

question before the court was the right of the district to have the benefits to the lands within the district resulting from the *maintenance* of the dikes in the district ascertained and determined, and also to have the benefits to certain lands outside of the district, resulting from the maintenance of the dikes in the district, ascertained. It is obvious that the question of benefits accruing to lands by virtue of maintaining dikes after they have been constructed is in no manner foreclosed by the original decree, for the reason that the question of benefits derived from maintaining the dikes was not before the court in the original proceeding. The finding of the jury in that proceeding was merely the maximum amount of benefits conferred upon the property in the district by virtue of the *original construction* of the improvement. The question of the benefits arising by virtue of maintaining the dikes after they were constructed was, therefore, before the court for the first time in the supplemental proceeding. The conclusion of the court in the *Conner* case upon the facts to which it relates is clearly right, and the observations upon the question here presented must be treated as *obiter*.

We conclude, therefore, that the finding of the jury, that the property embraced within drainage district No. 11 would be benefited by the construction of the proposed drainage improvement to the extent of $18,175.75 and no more, when approved and confirmed by the court, became a final and conclusive determination of the question of maximum benefits arising from the construction of the improvement, and that question cannot again be opened to fresh litigation.

This brings us to a consideration of the statute relied upon by appellants and hereinbefore set forth. In view of our conclusion concerning the character and effect of the decree in the original proceeding, it necessarily follows that, if the amendment of 1907, *supra*, must be construed as attempting to authorize a reascertainment of benefits arising to the property in the district because of the construction of

the drainage improvement, the act manifestly would be unconstitutional as disturbing vested rights. However, we are of the opinion that the act does not contemplate a reascertainment or a subsequent fixing of the amount of the benefits accruing to the property by reason of the original construction of the improvement, but that it merely confers upon the district the right to make supplemental assessments to pay for the cost of constructing the original improvement, provided the amount of the deficiency, plus the amount of the assessment made in the original proceeding, does not exceed the amount of maximum benefits as originally fixed and determined by the jury. To illustrate: If the jury in the original proceeding had found that the maximum amount of the benefits arising to the property in the district by virtue of the construction of the proposed drainage improvement would be $35,000, and the original assessment, based upon the estimated cost of the improvement, had been the sum of $16,614, and it subsequently had been found that the improvement would cost $32,812.29, then the district, under the authority of the amendment under consideration, could have levied a supplemental assessment in the sum of $16,198.29 to cover the deficiency, for the reason that the aggregate of the original and the supplemental assessments would be less than the maximum amount of the benefits to the property as originally found by the jury. 2 Page and Jones, Taxation by Assessment, § 954.

This construction of the statute must be preferred, in view of the well settled canon of construction that, where a statute is open to two constructions, one of which will render it constitutional and the other of which will render it unconstitutional, the former and not the latter is the construction to be adopted. Inasmuch, however, as the jury in the original proceeding found the amount of maximum benefits to be $18,175.75, and the amount of the original assessment against the property, based upon the estimated cost of the improvement, was $16,614, there is still room for a supple-

mental assessment in an amount not to exceed $1,561.75, and to that extent the petition states a cause of action.

We conclude, therefore, that the judgment of the lower court should be reversed, and the cause remanded for proceedings consistent with this opinion.

ELLIS, C. J., MORRIS, CHADWICK, and MAIN, JJ., concur.

[No. 13592. Department Two. February 1, 1917.]

P. N. YUILL, *Respondent*, v. G. H. BERRYMAN *et al.*, *Appellants*.[1]

MUNICIPAL CORPORATIONS—USE OF STREETS—AUTOMOBILES — ACCIDENTS AT CROSSINGS—NEGLIGENCE — EVIDENCE — SUFFICIENCY. It is clearly negligence for defendant to drive his car into plaintiff's car at a crossing, where plaintiff, having first entered the street intersection, had the right of way, and his car was in view, and defendant could have readily stopped in time, had he looked and seen plaintiff's car.

Appeal from a judgment of the superior court for King county, Smith, J., entered January 15, 1916, upon findings in favor of the plaintiff, in an action for damages sustained in an automobile collision, tried to the court. Affirmed.

Shorett, McLaren & Shorett (*Edward R. Taylor*, of counsel), for appellants.

Frank A. Paul, for respondent.

MOUNT, J.—This action was brought to recover damages resulting from a collision between two automobiles. The plaintiff alleged that the defendant was negligent and ran against the plaintiff's car, causing damages to the car and personal injuries to the plaintiff. The defendant answered, denying negligence, admitting the collision, and alleged that the plaintiff was negligent, and damaged the defendant's car, and sought damages on account thereof. Upon these

[1]Reported in 162 Pac. 513.

issues, the case was tried to the court without a jury. At the conclusion of the trial, the court found in favor of the plaintiff, fixed his damages at $104.45 for repairs to the car, and $250 for personal injuries. Judgment was entered against the defendant for $354.45. The defendant has appealed.

The one question presented in the case is whether the respondent should recover. It appears that, on the 30th day of May, 1915, at about three o'clock in the afternoon, the respondent was driving his car east on Denny Way. At the same time, the appellant was driving his car north on Seventeenth avenue. Denny Way runs east and west, while Seventeenth avenue runs north and south. These streets intersect each other. They are both paved streets. At the intersection of these streets, they are twenty-four feet wide from curb to curb. On that day the pavement was dry, and at this point the streets were practically level. The evidence conclusively shows, we think, that the respondent, traveling east on the south side of Denny way, arrived at the intersection first. When he entered the intersection of these streets, he was traveling at from four to eight miles per hour. At that time, the defendant was to the south of Denny Way, on the right-hand side of Seventeenth avenue, going north approaching the intersection. He was from forty to fifty feet away. He entered the intersection, according to his evidence, at from four to eight miles per hour.

It is claimed by the appellant that the respondent's automobile struck the left front wheel of the appellant's automobile, and caused the injury, while the respondent claims that the appellant's automobile struck his automobile about the center, and caused the damage complained of. If the testimony of the parties is to be believed, they were each traveling within the speed limit. It is clear from the evidence that the respondent's automobile entered the intersection of these streets first; that the appellant's car, at that time, was forty or fifty feet away, and, as stated above, the crossing at this place is twenty-four feet wide. If each had proceeded,

therefore, at the same rate of speed, there would have been no accident, because the streets are only twenty-four feet wide. The respondent, having entered the intersection of these streets first, was clearly entitled to the right of way. It was the duty, therefore, of the appellant to have stopped his car, or so slackened his speed that there would have been no collision. He apparently did not slacken his speed, but crashed into the side of the respondent's car. Whether he did so or not was a disputed question of fact, but we think the evidence plainly shows that it was the appellant's car which crashed into the side of the respondent's car. It is plain that, if these cars were traveling at the rate of speed which the evidence tends to show, namely, from four to eight miles per hour, when they were approaching each other, they could have been readily stopped without any collision. The appellant did not reach the intersection of these streets until the respondent was well upon the crossing. He did not see the respondent until, as he testified, he was within four to eight feet of him. It was appellant's duty to see and to avoid the respondent. Not having done so, he was clearly negligent. The appellant had a clear view of the respondent for fifteen or twenty feet, or more, before respondent entered upon the intersection of the streets. The respondent, having the right of way, as we have indicated above, it was the appellant's duty to avoid him, which could easily and readily have been done if his car had been under control.

From a careful reading of the statement of facts, we are satisfied that the trial court properly found that the appellant was negligent, and that the respondent was not negligent.

It follows that the judgment must be affirmed.

MORRIS, HOLCOMB, PARKER, and FULLERTON, JJ., concur.

[No. 12944. *En Banc.* February 2, 1917.]

DU PONT DE NEMOURS POWDER COMPANY, *Respondent*, v. NATIONAL SURETY COMPANY, *Appellant*.[1]

RAILROADS—CONTRACTOR'S BOND—LIENS—FILING — STATUTES. Until filed in the county auditor's office, there is no statutory liability upon a bond given by a railroad company to relieve its property from liens for labor and materials furnished to a contractor, as provided in Rem. Code, § 1129; and after the bond is taken and filed, the filing of a lien for labor or material furnished is unnecessary.

SAME—CONTRACTOR'S BOND—ACTIONS—PRIVITY. There being no privity between the parties, laborers and materialmen cannot maintain an action at common law upon a statutory bond given by a railroad company to relieve its property from liens for labor and material, as provided in Rem. Code, § 1129, the bond not having taken effect as a statutory bond because not filed as required by law (overruling in part, on rehearing, Id., 90 Wash. 227).

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 5, 1915, in favor of the plaintiff, in an action on an indemnity bond, tried to the court. Reversed.

John W. Roberts and *Geo. L. Spirk*, for appellant.

Sullivan & Christian, for respondent.

ON REHEARING.

MAIN, J.—The purpose of this action was to recover upon a bond given by a railway construction contractor. The obligee in the bond was the railway company. The bond was not filed in the office of the county auditor in the county where the work was being performed. The judgment of the trial court was in favor of the plaintiff. From this judgment, the defendant appeals.

The facts will be found stated in the former opinion in the case, reported in 90 Wash. 227, 155 Pac. 1050. After that opinion had been filed, a petition for rehearing was granted,

[1]Reported in 162 Pac. 866.

and the cause heard *En Banc*. Upon this further consideration of the case, we think that the former opinion should be limited to two propositions, the first of which is that there is no liability on the bond, treating it as a statutory bond, because it was not filed in the county auditor's office in the county in which the work was being done. Rem. Code, § 1129, provides that certain persons, performing labor or furnishing material, have a lien for the labor performed or the material furnished, and makes the contractor and other persons specified in the statute the agent of the owner for the purpose of the establishment of the lien. The section concludes with a proviso that, in the case of a railway company, a bond may be taken from the person with whom a contract is made, which bond shall be filed in the office of the county auditor in each county in which any part of the work is situated. This bond has two purposes: One, to relieve the railway company's property from lien liability; and the other, to substitute therefor, in favor of the persons mentioned in the statute, a right of action upon the bond. Construing this statute, in the case of *Laidlaw v. Portland, Vancouver & Yakima R. Co.*, 42 Wash. 292, 84 Pac. 855, it was held that the proviso was intended as an exception to the enacting part of the statute; that the right to a lien as against a railway company existed until a bond was taken and filed as required by the statute; that the remedies by lien and upon the bond were not cumulative; and that, when the bond is given as required by statute, this dispenses with the agency for the purposes of the lien, and takes the place of the lien. It was there said:

"The bond is made security for what the prior portion of the section has said shall be lienable against the railroad property. We think the proviso was intended as an exception, and that the section after the semicolon should be liberally read to the effect that every contractor shall be held to be the agent of the owner for the purposes of the lien, except that, in the case of railroad companies, the contractor's bond for the security of laborers and materialmen shall

dispense with such agency for the purposes of the lien, and shall take the place of the lien.

"In other words, it seems to us clear that it was intended to relieve railroad property from the burden of the lien if a good and sufficient bond is provided for the security of the labor and material; but that, if such bond is not provided, then railroad property, like all other classes of property named in the act, must be subject to the establishment and enforcement of the lien. The failure to take the bond not only subjects the property to the lien, but the railroad company is also made personally liable in connection with the enforcement of the lien; so that a personal judgment may be had against it as an additional security, if the lien shall prove insufficient. Such a construction is urged by respondents, and we think it is entirely reasonable. It gives force to the whole section as pertaining to the enforcement of liens. We see no other way to construe it so as to give operative force to all provisions in the section and at the same time confine them to the subject of the enforcement of liens, which is the subject of the act. The effect of the construction is to say that, under specified conditions, liens shall be enforced against railroad and other property, but that railroad property shall be excepted from the lien if a specified security is provided. Such a construction places no hardship upon laborers and materialmen. They have but to examine the records of the office of the county auditor of the county wherein the railroad is being constructed, in order to ascertain if a bond has been taken. If they find that there is no such bond, then they must know that their remedy by way of lien is complete, and that they must proceed accordingly. . . . So in the statute before us, the proviso should not be held to enlarge the enacting portion of the section so as to create an entirely independent and cumulative remedy which is not in any sense related to the enforcement of liens, of which subject the enacting part solely treats, but it constitutes an exception defining certain conditions which shall not be subject to the operation of the enacting part."

If, as held in that case, the right to the lien exists until the bond is taken and filed in the proper county, and the remedies are not cumulative, it necessarily follows that there can be no liability upon the bond, by virtue of the statute,

until the bond has been filed. In the present case, the bond was not filed in the county in which the work was being performed. Therefore, there can be no liability upon it, as a statutory obligation. It also follows, from the holding in the *Laidlaw* case, that, in order to predicate liability upon the statutory bond, it is not necessary that a lien be filed. If, as held in that case, the making and filing of the bond dispenses with the agency which may create the lien, there would not be, after the bond was taken and filed, any authority for the filing of the lien.

The second proposition is, treating the bond, not as a statutory bond, but purely as a common law bond, no action can be maintained upon it, because there was no privity existing between the respondent and the surety company. The result arrived at in the former opinion is adhered to, but the decision upon the first proposition is upon a somewhat different ground. So far as the former opinion is out of harmony with the views here expressed, it will be considered modified. The questions discussed in that opinion that are not here referred to will be reserved until litigation may arise in which they are necessarily involved. The judgment will be reversed, and the cause remanded with direction to the superior court to dismiss the action.

ELLIS, C. J., HOLCOMB, CHADWICK, MOUNT, and PARKER, JJ., concur.

[No. 13168. Department Two. February 2, 1917.]

THE STATE OF WASHINGTON, *Respondent*, v. A. MOSER, *Appellant*.[1]

GAMING — INFORMATION — NAME OF OFFENSE. An information charging the acts constituting gambling as defined in Rem. Code, § 2469, is not defective in that it erroneously designates the offense as "conducting gambling."

CRIMINAL LAW—VERDICT—DESIGNATION OF OFFENSE. A verdict finding the accused guilty as charged in an information for gambling under Rem. Code, § 2469, is not void for indefiniteness or uncertainty, nor insufficient because not enumerating specifically the several acts charged; there being no degrees in the crime charged.

SAME—JUDGMENT—NAME OF OFFENSE. A judgment finding the accused guilty of an offense erroneously designated as "conducting gambling," is not invalid, where it appears from the recitals and record that the accused was charged with a specific offense and that the jury returned a verdict of guilty of that offense, and that he was adjudged guilty and sentenced upon the verdict.

TRIAL—EVIDENCE—OBJECTIONS. Objection that evidence is incompetent does not raise the point that the questions were leading.

GAMING—EVIDENCE—ADMISSIBILITY. In a prosecution for gambling, it is inadmissible to show that like games were conducted in the community and not generally considered to be gambling games.

WITNESSES—INCRIMINATION OF WITNESS. That the testimony of a witness, employed by and informed against with the accused, would tend to incriminate him, does not render the witness incompetent, and is not ground for objection by the accused.

GAMING—EVIDENCE—SUFFICIENCY. A conviction of conducting a gambling game as owner is sustained by evidence that the accused furnished a room and the necessary paraphernalia for playing stud-poker, encouraged his customers to engage in it, and oversaw the game and took a percentage of the wagers on each hand.

Appeal from a judgment of the superior court for Walla Walla county, Mills, J., entered October 8, 1915, upon a trial and conviction of conducting a gambling game. Affirmed.

[1]Reported in 162 Pac. 582.

J. W. Brooks, for appellant.

Earl W. Benson, for respondent.

FULLERTON, J. — The appellant was convicted, in the superior court of Walla Walla county, of the crime of opening, conducting, and carrying on and operating as owner a gambling game, and appeals from the judgment and sentence pronounced upon him.

The information filed against him, omitting the formal parts, reads as follows:

"A. Moser is accused by the prosecuting attorney of the county of Walla Walla and state of Washington, by this information, of the crime of conducting gambling committed as follows: The said A. Moser on the 17th day of August, 1915, in the county of Walla Walla aforesaid then and there being, did wilfully, unlawfully and feloniously open, conduct, carry on and operate as owner a gambling game and game of chance played with cards whereby chips, a representative of money, was bet, wagered and hazarded upon a chance or uncertain or contingent event, which said gambling game or game of chance was so operated by the said A. Moser as owner, in that certain building located on the northwest corner of Third and Alder streets, city and county of Walla Walla, state of Washington, and in the back room of said building, contrary to the form, force and effect of the statute in such cases made and provided and against the peace and dignity of the state of Washington."

The first error assigned is that the information does not state facts sufficient to constitute a crime, the particular contention being that it charges the crime of conducting gambling, whereas there is no such offense under the laws of the state. It is true the information recites that the appellant is accused of the crime of conducting gambling, but this is but the name by which the prosecuting officer designated the offense. The sufficiency of the information does not depend upon the correctness of this designation; its sufficiency depends upon the facts alleged as constituting the offense. Here the facts alleged plainly charge the crime of opening,

conducting, carrying on and operating as owner a gambling game, the acts made a crime by the criminal code. Rem. Code, § 2469; *State v. Nelson*, 39 Wash. 221, 81 Pac. 721; *State v. Robey*, 74 Wash. 562, 134 Pac. 174.

The jury found the defendant guilty of the "crime charged in the information," and it is objected that this is insufficient, since it does not designate the degree of the crime of which the appellant is found guilty. But there are no degrees in this particular crime. The crime consists in doing one or more than one of the acts set forth in the statute as constituting the crime, and a verdict finding the defendant guilty as charged, on an information charging all of the designated acts, is not void for indefiniteness or uncertainty, nor insufficient because it does not enumerate specifically the several acts which it is found the defendant committed.

The judgment and sentence of the court was as follows:

"Now on this day comes Earl W. Benson, prosecuting attorney for Walla Walla county, Washington, and the above named defendant A. Moser, in his own proper person, and also by J. W. Brooks and John A. Metcalfe, his counsel, the same being the time fixed by this court to pronounce judgment and sentence herein upon the verdict of guilty heretofore entered herein. And the court thereupon informs the said defendant A. Moser of said verdict of guilty, and asks him if he has any legal cause to show why judgment should not now be pronounced against him, the defendant thereupon answers that he has not. Defendant's motion for a new trial is denied. Wherefore it is considered and adjudged by the court that upon the said verdict of guilty, said defendant A. Moser is guilty of the crime of conducting gambling and it is ordered and adjudged by the court that he, the said defendant A. Moser, be imprisoned in the penitentiary of the state of Washington, at Walla Walla in said state, for the period of not less than fifteen months nor more than five years, at hard labor. And it is further ordered and adjudged by the court, that he, the said defendant A. Moser, pay the costs of this prosecution, taxed at $69.90. Defendant by his counsel now gives notice of appeal in open court and his bond is fixed at $1,500.00."

It is objected that the sentence is void because it finds the defendant guilty of the crime of conducting gambling, a crime unknown to the laws. But the judgment must be read as a whole and in connection with the record of the cause in which it is entered, and, if when so read, it is not indefinite or uncertain, it is neither void nor voidable. From an examination of this record, we know that the appellant was charged with a specific offense, and that the jury returned a verdict against him finding him guilty of that specific offense. The judgment makes it clear that he was adjudged guilty and sentenced upon the verdict. The fact that the judgment, in designating the offense, may have given it a wrong designation does not affect the validity of the judgment. *State v McLain*, 43 Wash. 124, 86 Pac. 388.

A number of questions were propounded to the state's witnesses by the prosecuting attorney to which the appellant made objections and which the trial court permitted to be answered. These we shall not notice in detail. While some of them appear to be leading, the objections went to the competency of the evidence sought to be elicited rather than to the form of the question. The ruling of the court must be considered in the light of the objection, and we do not find that any incompetent evidence was elicited by the questions.

In this connection it is urged that the court erred in refusing to permit a witness to testify that other persons engaged in like business to that of the appellant permitted similar games to be conducted in their places of business; the purpose being to show that such games were not generally considered in the community to be gambling games such as were prohibited by the statute. The evidence was properly rejected. If the appellant actually violated the statute, the opinion of the community on the question was immaterial.

In the course of the trial, one Charles Hughes was called as a witness on behalf of the state. It appeared that he had participated in the game as an employee of the appellant and had been informed against for the offense. Objection was

made to his competency and to his testifying until he was informed of his right to refuse to testify, on the ground that his testimony might tend to incriminate himself. These objections the court rightly overruled. The fact stated did not render the witness incompetent, however much it might tend to impeach his reputation for veracity. His right to refuse to testify was a privilege personal to himself; the appellant could not make the objection for him.

Finally, it is urged that the evidence is insufficient to sustain the verdict. But we think it tended to support every material issue. The game the appellant was convicted of conducting was one commonly known as stud-poker. It was shown not only that the appellant furnished the room in which the game was played, furnished the paraphernalia necessary to carry it on, encouraged his customers to engage therein, and oversaw the game himself or hired some one to oversee it, but that he took from the sums wagered on each several hand, for his own emolument, a percentum of the amount wagered. The weight of the evidence was for the jury, and we have no warrant to disturb their conclusion.

The judgment is affirmed.

MORRIS, PARKER, WEBSTER, and HOLCOMB, JJ., concur.

[No. 13450. Department Two. February 2, 1917.]

B. C. HOON *et al.*, *Respondents*, v. THE CITY OF SEATTLE, *Appellant*.[1]

APPEAL—REVIEW—HARMLESS ERROR. Where, in an action for personal injuries, plaintiff voluntarily withdrew all claims for injuries not included in the complaint, error in the admission of evidence thereon is cured by striking it and instructing the jury to disregard it.

Appeal from a judgment of the superior court for King county, Jurey, J., entered October 19, 1915, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by reason of a defective sidewalk. Affirmed.

Hugh M. Caldwell and *Patrick M. Tammany*, for appellant.

Thomas R. Horner and *James L. Crotty*, for respondents.

PARKER, J.—This is an action to recover for personal injuries which it is claimed resulted to the plaintiff Mrs. Hoon from the negligence of the defendant city in the maintenance of a defective sidewalk upon one of its public streets. Trial in the superior court sitting with a jury resulted in verdict and judgment in favor of the plaintiffs, awarding them $500, from which the city has appealed to this court.

It is contended in the city's behalf that the trial court erred to its prejudice in admitting in evidence testimony tending to show that, shortly following being injured, Mrs. Hoon was afflicted with appendicitis as the result of, or at least as being aggravated by, her injuries. This contention is rested upon the theory that the claim filed by respondents with the city preliminary to the commencement of this action makes no mention of any such affliction as the result of Mrs. Hoon's injuries. After the introduction of this testimony,

[1]Reported in 162 Pac. 584.

counsel for respondents voluntarily withdrew any claim of damage they might have against the city because of Mrs. Hoon's affliction with appendicitis, and consented that all testimony with reference thereto be stricken. This withdrawal of claim of recovery upon that account, and the court's ruling striking the testimony, was made in the presence of the jury in such manner as to plainly advise the jury that it was not to take into consideration this affliction of Mrs. Hoon in measuring any award of damage which might be made in her favor. It seems quite plain to us that there was thus cured whatever error may have occurred in admission of this testimony. This plainly was not such an error in the admission of testimony as could not be cured by striking it out, accompanied by appropriate instructions to the jury, as was done in this case. Indeed, it could well be argued that the admission of this testimony was not error, in view of the language of the claim filed by respondents with the city. We note this fact as showing that there was no bad faith on the part of counsel for respondents in the offering of this testimony.

It is contended that the evidence does not support the verdict and judgment and that, for that reason, the trial court erred in declining to dispose of the case in the city's favor as a question of law, in compliance with motions and requests for instructions made by counsel. This contention involves questions of fact only. We have reviewed the evidence with care and are convinced therefrom that Mrs. Hoon was previously injured in her shoulder, her hip, and also in a measure internally, as asserted in her and her husband's claim filed with the city preliminary to the commencement of this action, and that the jury were fully warranted in concluding that her injuries resulted from the city's negligence. The award of $500 seems very moderate in amount. We think this contention needs no further notice.

The judgment is affirmed.

MORRIS, HOLCOMB, MOUNT, and FULLERTON, JJ., concur.

[No. 13491. Department Two. February 2, 1917.]

A. R. TRUAX *et al.*, *as Spokane Cedar Pole Company, Respondents*, v. TITLE GUARANTY & SURETY COMPANY, *Appellant*.[1]

ATTACHMENT—REDELIVERY BOND—ACTIONS — DEFENSES — VALIDITY AGAINST MORTGAGEES—WAIVER. The invalidity of a writ of attachment, as against a prior mortgagee, in the failure to pay or tender the amount due to the mortgagee or cause to be attached only the equity of the redemption as provided by Rev. Code Idaho, § 3411, is of no concern to the surety upon the attachment debtor's redelivery bond, and is no defense to an action on the bond, where the mortgagee made no effort to have the matter determined in the court having jurisdiction by a summary proceeding, as provided in Id., § 4314.

SAME—REDELIVERY BOND—WAIVER OF DEFECTS—PRESERVATION OF LIENS. A redelivery bond in attachment, intended as a substitute for chattels seized in order that the attachment lien shall be absolutely annulled, is a new and independent contract which waives all defects in and objections to the attachment; hence judgment in the attachment case need not preserve the lien of the attachment.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered February 4, 1916, upon findings in favor of the plaintiffs, in an action on a redelivery bond, tried to the court. Affirmed.

D. W. Henley, for appellant.

McCarthy, Edge & Davis, for respondents.

HOLCOMB, J.—In an action instituted in a district court of Bonner county, Idaho, by these respondents against four brothers, copartners under the firm name of Lazos Brothers, a writ of attachment was sued out and placed in the hands of the sheriff of that county for levy upon property of the defendants there. The sheriff returned the writ, showing a seizure and taking into possession by him under the writ of certain chattels as the property of the defendants. Subse-

[1]Reported in 162 Pac. 586.

quently the defendants Lazos Brothers filed a bond in the sum of $1,500 with the appellant as surety, which was approved by the court where the action was pending, for the release of the attachment upon the chattels so seized and the redelivery thereof to the defendants. The condition of the redelivery bond was that "in case the plaintiffs recover judgment in said action, the defendants will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of the judgment so obtained, or on default thereof, the defendant and this surety will, on demand, pay to the plaintiffs the amount of the recovery in said action, together with all costs thereon, not exceeding the said sum of $1,500." The giving of such bond is provided for by the Idaho statutes (Revised Codes, Idaho, §§ 4319, 4320), upon application, on reasonable notice, to the court in which the action is pending for an order "to release from the operation of the attachment any or all of the property attached, and all of the property so released and all of the proceeds of the sale thereof must be delivered to the defendants." The property so taken by the sheriff under attachment was, upon the execution, delivery and approval of the redelivery bond, turned back by the sheriff to the defendants. Later, the respondents obtained judgment in the district court for the recovery of the sum of $771.61, with interest at eight per cent from the dates of their notes sued on, $58.20 costs, and an attorney's fee of $125.

Upon this judgment execution was issued, delivered to the sheriff of the county for execution, and later by him returned with the return "nothing found." Thereupon the sheriff, at the direction of the judgment creditors, demanded from Lazos Brothers, the judgment debtors, the return of *all* the property released from attachment under the redelivery bond, and the property so demanded, having been disposed of by the defendants, was not redelivered, which facts the sheriff certified. Upon the failure to redeliver the property released by the redelivery bond, this action was instituted against the

surety company in the superior court of this state, resulting in a judgment against appellant upon the redelivery bond, for the amount of the total Idaho judgment, costs and attorney's fee, and the costs of this action.

The first complaint of error by appellant is based upon certain facts which it asserts, under the laws of Idaho, rendered the pretended levy of attachment by the Idaho sheriff absolutely void. These facts appellant offered to prove by certified copies of public records in Bonner county, Idaho, of the existence of a certain chattel mortgage from Lazos Brothers to a bank antedating the suit and attachment, an assignment by the bank of this chattel mortgage to the National Pole Company, and also a prior bill of sale to the National Pole Company; all of which offers of evidence the trial court rejected, holding that the existence, at the time of the attachment, of mortgages and bills of sale on some of the property attached could not properly be urged as a defense in an action to recover on the redelivery bond.

Appellant relies upon the statute of Idaho (Revised Codes, Idaho, § 3411), which provides that:

"All mortgaged personal property may be attached at the suit of any creditor of the mortgagor; such creditor, however, must pay or tender to the mortgagee, the amount due him on such mortgage before the officer making such attachment is entitled to the actual possession of such property."

It is shown that there is no evidence that the respondents, when causing their attachment to be levied in Idaho, made any tender to the mortgagee; nor did they cause to be attached only "the equity of redemption in the mortgaged chattels," under a further clause of that statute providing that, if the attaching creditor prefers, he may cause to be attached the equity of redemption of the mortgagor, by serving upon both the mortgagor and the mortgagee a copy of the writ of attachment and a notice signed by the attaching officer that the interest of the mortgagor is attached. Decisions of the supreme court of Idaho are cited as holding that a substan-

tial compliance with the provisions of the statute relating to levies of attachment is necessary to make a valid levy. *Falk-Bloch Mercantile Co. v. Branstetter*, 4 Idaho 661, 43 Pac. 571; *First Nat. Bank v. Sonnelitner*, 6 Idaho 21, 51 Pac. 993; *Williams v. Olden*, 7 Idaho 146, 61 Pac. 517, 97 Am. St. 250.

In the last cited case, it was held that "no lien is created unless the *service of the writ* is made in substantial compliance with the statute," which in that case was held not done. In *Bank v. Sonnelitner, supra*, it was held that, if *the acts required of the officer* by the statute are not performed by the officer, there is no lien. In the *Williams v. Olden* case, it was said of another case (*First Nat. Bank v. Lieuallen*, 4 Idaho 431, 39 Pac. 1108) that in that case "no question was raised as to the performance of the *acts required by the officer* in the levy of the writ." In the case at bar, the validity of the levy is not attacked because of the failure of the officer to do any act required of him, but the only default claimed is that of respondents themselves, the creditors, in not tendering the mortgagee the amount of its mortgage, or, otherwise, directing that their preference was to attach only the equity of redemption of the mortgagors; in neither of which matters had the officer anything to do without the action and direction of the creditor, under the statute, and in neither of which contingencies did he fail.

It may be conceded that the levy was void as to the prior mortgagee and incumbrancer by bill of sale; but, as to them, they made no effort to have that matter determined in the court having jurisdiction of the cause and of the property, by a summary proceeding which could be made before the sheriff holding the property, under Revised Codes, Idaho, § 4314. And as to their rights in the premises, the appellant, as surety on the debtors' redelivery bond, had and has no concern whatever. As to the attachment defendants, unless the attachment was irregularly or improvidently issued, which contention they never made, the levy was certainly good as

properly made against them, though irregular and possibly void as to the incumbrancers.

The redelivery bond was the substitute for the chattels seized. It is the design of the statutes of Idaho providing for such substitution that the attachment lien of the creditors shall be absolutely annulled, the property pass back into the hands of the defendants unincumbered by the lien of attachment, and that the attaching creditor rely wholly, though involuntarily, upon the undertaking given by the defendants.

"This undertaking would seem to be a new and independent contract, into which the defendant and his sureties enter, regardless of plaintiff's desire in the premises, but for his security. . . . It would seem clear upon principle that an undertaking entered into under such circumstances should be held a new and independent contract, and should operate as a waiver of all defects in, and objections to, the original attachment proceedings which the defendant could have made." *Glidden v. Whittier*, 46 Fed. 437.

The above case was one originating in Idaho in the Federal district court and involving the same statutes. See, also, *Rosenthal v. Perkins*, 123 Cal. 240, 55 Pac. 804, and *San Francisco Sulphur Co. v. Aetna Indemnity Co.*, 11 Cal. App. 701, 106 Pac. 111, involving identical statutory provisions; 4 Cyc. 700; 2 R. C. L. 890, § 106; *Oliver v. Warren*, 124 Ga. 549, 53 S. E. 100, 110 Am. St. 188, 4 L. R. A. (N. S.) 1020; *Fidelity & Deposit Co. v. Bowen*, 123 Iowa 356, 98 N. W. 897, 6 L. R. A. (N. S.) 1021; *Brady v. Onffroy*, 37 Wash. 482, 79 Pac. 1004.

The second proposition by appellant is, in substance, that the entry of a general judgment in the suit in Idaho, which did not preserve the lien and form of the original attachment, operated as a release of the obligations of the redelivery bond. As was heretofore observed, the design of the Idaho statute was to effect, by the giving of the redelivery bond, the absolute release of the attachment so that the property

passed back unaffected by the lien of attachment, and to substitute therefor the new and independent contract of the undertaking provided for.

This being so, the judgment could not and should not attempt to preserve the lien of an attachment that had been absolutely released, passed out of existence, and another security substituted. *Brady v. Onffroy, supra;* 2 R. C. L. 853, § 65; 4 Cyc. 692, 826.

There was no error. Judgment affirmed.

MORRIS, MOUNT, FULLERTON, and PARKER, JJ., concur.

[No. 13499. Department Two. February 2, 1917.]

SILER MILL COMPANY *et al.*, *Respondents*, v. THE CHARLES NELSON COMPANY, *Appellants*, ANDREW PETERSON, *Defendant*.[1]

MECHANICS' LIENS — CONSTRUCTION OF VESSEL — JURISDICTION — STATE OR FEDERAL. An action to foreclose mechanics' liens for the construction of a vessel, seeking personal judgment against the contractor and a receivership, is not strictly an action *in rem* but only *quasi in rem*, and may be maintained in a state court against a foreign owner.

SAME—MARITIME CONTRACTS. A contract to build a vessel not being a maritime contract, the foreclosure of liens therefor under Rem. Code, § 1182, is not within the jurisdiction of admiralty, and is properly brought against a foreign owner in a state court.

SAME—CARTAGE—WAIVER—DELIVERY. A claim by a common carrier for a lien against a vessel for the cartage of materials is not waived by delivery, as in the case of a possessory lien.

SAME—CARTAGE—CLAIMS BY COMMON CARRIER. A common carrier may claim a lien for the cartage of lumber furnished for the construction of a vessel bought f. o. b. mill wharves, and hauled to the place of construction at the request of the contractor.

SAME—CONSTRUCTION OF VESSEL — NOTICE TO OWNER — STATUTE—AMENDMENT. Rem. & Bal. Code, § 1133, requiring notice of the furnishing of materials for certain enumerated structures to be given

[1]Reported in 162 Pac. 590.

to the owner, having been amended by 3 Rem. & Bal. Code, § 1133, by omitting therefrom the words "steamer, vessel, boat," it was the intention to dispense with the necessity of notice to owners of boats, and the same would therefore not come within the general terms "or any other building or any other structure," contained in the amending act.

SAME—INTEREST. Interest is allowable upon an unliquidated claim for a lien against a vessel for the cartage of materials, from the date of filing the complaint, no lien notice being necessary.

Appeal from a judgment of the superior court for Pacific county, Edward H. Wright, J., entered December 11, 1915, upon findings in favor of the plaintiffs, in consolidated actions to foreclose mechanics' liens, tried to the court. Affirmed.

Robert G. Chambers, for appellant.

Welsh & Welsh, for respondents.

HOLCOMB, J.—In consideration of $52,500, Andrew Peterson, by a written contract, agreed to construct a certain boat for appellant, The Charles Nelson Company. Peterson, during the time the ship was being constructed, contracted indebtedness to respondents Siler Mill Company and Quinault Lumber Company for materials furnished; also to defendants Willapa Construction Company and Sheppard & Dennis for hauling such materials to the ship yard. Peterson never fulfilled the terms of his contract and, at the time of his default, The Charles Nelson Company had paid him the sum of $34,400, as well as various sums to laborers and materialmen, which in the aggregate exceeded the contract price of $52,500. The various respondents then commenced separate actions, by virtue of Rem. Code, § 1182, to foreclose their respective alleged liens against the vessel, which actions were subsequently consolidated. From a decree foreclosing these liens, The Charles Nelson Company has appealed to this court.

By the terms of the contract, it fairly appears that title to the boat during its construction vested in appellant, The Charles Nelson Company, which was a foreign corporation;

and appellant contends that a lien by virtue of a state statute cannot be enforced in an action *in rem* in a state court against a boat owned by a foreign corporation, urgently insisting that the proper course for respondents to have pursued was to bring a personal action against the owners of the vessel, and to attach the vessel or any other property of the owner, as security for any judgment that might be obtained. This argument proceeds upon the assumption that the present action is *in rem* and not *in personam*.

The pleadings disclose that both Peterson and The Charles Nelson Company were made parties defendant, that a personal judgment as against Peterson was prayed for, as well as the foreclosure of the lien. Respondents also asked for appointment of a receiver to take charge of the ship, and a temporary restraining order to prevent The Charles Nelson Company from removing the boat from the jurisdiction of the court. It is apparent, therefore, that this is not strictly an action *in rem*, but is one frequently spoken of as *quasi in rem*, because it seeks only to subject certain property of the debtors to the discharge of the claims asserted. *Gassert v. Strong*, 38 Mont. 18, 98 Pac. 497.

But in any event, appellant's contention that the present action cannot be enforced in a state court by virtue of a state statute creating a lien, cannot be sustained, as these materials were furnished to Peterson, who had contracted to build a vessel, which is universally held not to be a maritime contract. *Washington Iron Works Co. v. Jensen*, 3 Wash. 584, 28 Pac. 1019; *Delaney Forge & Iron Co. v. The Winnebago*, 142 Mich. 84, 105 N. W. 527, 113 Am. St. 566; *Johnson v. Chicago & Pac. Elev. Co.*, 119 U. S. 388; *Knapp, Stout & Co. v. McCaffrey*, 177 U. S. 638.

If the contract in question were a maritime contract, appellant's contention would be a meritorious one, as any action cognizable in admiralty, whether *in rem* or *in personam*, is within the exclusive jurisdiction of the admiralty courts. But, as was said in *Knapp, Stout & Co. v. McCaffrey, supra:*

"The rule to be deduced from these cases, so far as they are pertinent to the one under consideration, is this: That wherever any lien is given by a state statute for a cause of action cognizable in admiralty, either *in rem* or *in personam*, proceedings *in rem* to enforce such lien are within the exclusive jurisdiction of the admiralty courts. But the converse of this proposition is equally true, that if a lien upon a vessel be created for a claim over which a court of admiralty has no jurisdiction in any form, such lien may be enforced in the courts of the state. Thus, as the admiralty jurisdiction does not extend to a contract for building a vessel, or to work done or materials furnished in its construction, *The Jefferson, (People's Ferry Co. v. Beers)*, 20 How. 393; *The Capitol, (Roach v. Chapman)*, 22 How. 129, we held in *Edwards v. Elliott*, 21 Wall. 532, that, in respect to such contracts, it was competent for the states to enact such laws as their legislatures might deem just and expedient, and to provide for their enforcement *in rem*."

It is apparent, from the rule laid down in that case, that it is immaterial whether the present action is *in rem* or *in personam*.

Again, in *West v. Martin*, 51 Wash. 85, 97 Pac. 1102, 21 L. R. A. (N. S.) 324, this court, in construing the lien statute in question, said:

"Such liens created by state statutes are enforcible in the state courts when the subject-matter is not within the jurisdiction of admiralty."

The Roanoke, 189 U. S. 185, which is strongly relied on by appellants, is not in point, as the materials there were furnished to persons who had contracted to repair a vessel in maritime service, which was clearly a maritime contract, and thus within the exclusive jurisdiction of the admiralty courts.

Nor do we consider the case of *Waddell v. Steamer Daisy*, 2 Wash. Terr. 76, 3 Pac. 616, in point, as the statute construed in that case is not the same as that now in force, Rem. Code, § 1182; and respondents, having furnished materials to the contractor Peterson, are squarely within the terms of the present statute.

It is next urged that the trial court erred in allowing the liens of respondents Willapa Harbor Construction Company and Sheppard & Dennis, which are claims for cartage, on the grounds that these are not lienable items, the materials having been purchased f. o. b. mill wharves; and, secondly, if they were lienable items, they were waived by the claimants thereof by delivery. The rule that a carrier's possessory lien is waived by a common carrier by delivery is only applicable when the lien is sought to be established against the specific article carried and delivered; not where the materials so carried are used in and become a part of the finished structure upon which the lien is sought to be established, as in the instant case.

The other objection, however, presents a more serious problem. So far as we have been able to ascertain, when the person furnishing materials delivers them at the place of construction and includes the cartage expense in price of the materials, no objection has ever been made to including the price of hauling in the expense of materials and thus making the price of hauling a lienable item. This rule was followed in *Brace & Hergert Mill Co. v. Burbank*, 87 Wash. 356, 151 Pac. 803. This being true, we are unable to see why a lien should not be allowed to a carrier where the materials were bought f. o. b. mill wharves, as in this case, and hauled by a common carrier to the place of construction at the request of the contractor; for if it can be included in the first instance in the price of the material and a lien made to cover it, it would seem to follow as a logical conclusion that the carrier could make a separate contract with the contractor for hauling and enforce a lien therefor, the same as for labor entering into the same. In the end it amounts to the same thing, as in one case the cost of cartage is added to the price of the materials, and in the other it is not, but is paid to the carrier under a separate agreement; and no matter under what guise this cost of hauling is considered, if it is lienable under the

statute in one case it is also in the other. This conclusion is amply sustained by the authorities. *Hill v. Newman*, 38 Pa. St. 151, 80 Am. Dec. 473; *Hill v. Twin Falls Salmon River Land & Water Co.*, 22 Idaho 274, 125 Pac. 204; *Kehoe v. Hansen*, 8 S. D. 198, 65 N. W. 1075, 59 Am. St. 759; *Davis v. Mial*, 86 N. J. L. 167, 90 Atl. 315, Ann Cas. 1916E 1028.

We are also urged by appellant to hold the liens invalid because no notice was ever given by any of respondents to appellant, The Charles Nelson Company, that material for which a lien would be claimed was being furnished by them to Peterson to be used in the construction of the vessel. This question involves the consideration of the several statutes on the subject. In 1909, the legislature passed a law, found in Laws 1909, ch. 45, p. 71, Rem. & Bal. Code, § 1133, providing that, before a lien could be claimed by any one

"furnishing material or supplies to be used in the construction, alteration or repair of any mining claim, building, wharf, steamer, vessel, boat, bridge, ditch, dyke, flume, tunnel, well, fence, machinery, railroad, street-railway, wagon road, aqueduct to operate hydraulic power, or any other building or any other structure,"

he must mail a notice thereof to the owner.

This law was amended by Laws 1911, ch. 77, p. 376 (3 Rem. & Bal. Code, § 1133), among other minor details, by omitting therefrom the words "steamer, vessel, boat." By this action on the part of the legislature it seems quite evident, from a comparison of these two statutes, it was the intention that it should no longer be necessary for a person furnishing materials to be used in the construction of a steamer, vessel or "boat" to give notice thereof to the owner in order to enforce his lien.

It is claimed by appellant that the words "or any other building or any other structure," used in Laws 1911, ch. 77, p. 376 (3 Rem. & Bal. Code, § 1133), are sufficiently broad to include vessels in the course of construction on land. We

cannot agree with this construction, in view of the fact that the legislature used the identical phrase "or any other building, or any other structure," in the statute enacted in 1909, wherein they also used the words "steamer," "vessel" and "boat," thus clearly showing that they did not consider that boats and vessels were included *ex vi termini* within the meaning of the words "building" and "structure," for otherwise it would have been an idle act to enumerate boats and buildings and structures in the same statute. The intention of the legislature must control in construing a statute when it is capable of being ascertained.

Finally, it is asserted that the court erred in allowing interest on the several claims from the date of filing the various complaints. Appellant's contention is that, since the claims were unliquidated until the signing of the agreed statement of facts, only interest from that date should have been allowed. While the general rule is that no interest can be allowed in the case of an unliquidated claim, yet, in cases where a lien is concerned, it has been held by this court that interest will be allowed from the date of giving the notice of lien or when the lien is claimed; and since no lien notice was required to be filed in the present case, the lien was undoubtedly claimed by the filing of a complaint, and interest was properly allowed from that date. *Brace & Hergert Mill Co. v. Burbank*, 87 Wash. 356, 151 Pac. 803; *Cornelius v. Washington Steam Laundry*, 52 Wash. 272, 100 Pac. 727.

The decree is affirmed.

MORRIS, MOUNT, FULLERTON, and PARKER, JJ., concur.

[No. 13504. Department Two. February 2, 1917.]

THE STATE OF WASHINGTON, *Respondent*, v. HIRAM D. LANCE, *Appellant*.[1]

CRIMINAL LAW—APPEAL — REVIEW — VERDICT. Where there was substantial evidence to support every material fact necessary to sustain a verdict of guilty, and the trial court has refused to interfere, the verdict is conclusive on appeal.

HOMICIDE—SELF-DEFENSE—EVIDENCE—QUESTION FOR JURY. Upon a plea of self-defense, in a prosecution for homicide in which there was evidence tending to show that the accused intended to take a child from the custody of another, at any hazard, armed himself with a revolver, entered the house without warning, and the killing thereafter ensued, it was proper to leave to the jury the question whether the accused was unlawfully in the house where the affray occurred or whether his going there was lawful.

CRIMINAL LAW—APPEAL—INSTRUCTIONS—REASONABLE DOUBT. An instruction upon the subject of reasonable doubt to the effect that the jury could take into consideration the strong probabilities of the case, while subject to criticism standing alone, is not prejudicial when, taken with its context, it could not have misled the jury.

SAME—TRIAL—INSTRUCTIONS. It is proper to instruct the jury to disregard any statements made by counsel concerning the evidence, unless they found the statement to be borne out by the evidence.

Appeal from a judgment of the superior court for Snohomish county, Alston, J., entered June 7, 1915, upon a trial and conviction of manslaughter. Affirmed.

E. C. Dailey and *Clifford Newton*, for appellant.

O. T. Webb and *Percy Gardiner*, for respondent.

FULLERTON, J.—The appellant was informed against for the crime of murder in the first degree. The jury found him guilty of manslaughter. From the judgment pronounced upon the verdict, he appeals.

The facts, in so far as they are undisputed, disclose that appellant had married a niece of the person killed; and two

[1]Reported in 162 Pac. 574.

children, both boys, had been born of the marriage. The appellant and his wife had separated, the wife on leaving taking with her the two children. The deceased lived at the home of his brother, and at this home the wife had left one of the children. The appellant, learning of the whereabouts of the child, armed himself with a revolver and went to the house ostensibly to get possession of the child. On entering the house, he met the person afterwards killed, and a scuffle followed, during which the shot was fired by the appellant which resulted in the death. As to which of the persons began the immediate affray, there is dispute in the evidence between the appellant and the witnesses residing in the house. There is, however, evidence in the record tending to show that the appellant had made threats to do bodily harm to the persons having the custody of the child if it was not delivered over to him, that he was the aggressor in the affray, that he entered the house in a hurried manner, without warning, with the revolver in his hand, and began the assault immediately upon meeting the deceased. There is evidence also to the effect that appellant had sought the advice of certain county officials of Snohomish county concerning his right to possession of the child, and had been advised by them that he had a right to such possession. It does not appear, however, that he was advised as to the methods to which he could lawfully resort in order to obtain possession of the child; much less does it appear that he was advised that the method resorted to by him was a lawful method, or that he would be justified in resorting to force of any kind.

The appellant first contends that the evidence is insufficient to justify the verdict; but without further reviewing the record, we are satisfied that there is substantial evidence tending to show every material fact necessary to be shown in order to sustain the verdict found. This is as far as the appellate court may legitimately inquire. The weight of the evidence was for the jury, and, when it is found that every material fact necessary to be proven has support in the evidence and

that the trial court has refused to interfere, the verdict is conclusive.

It is next assigned that the court erred in its instructions to the jury. The first of these of which complaint is made is the instruction on the law of self-defense. The instruction as a whole is as follows:

"You are further instructed that a person need not be in actual imminent peril of his life or limb or of great bodily harm before he may defend himself. It is sufficient if he, in good faith, has a reasonable belief from the circumstances that appear to him at the time that he is in imminent peril or danger, and if he honestly believes such to be the case, then he has a right to act in self-defense. When a man without fault on his part is suddenly and violently assaulted under circumstances such as to induce or cause in his mind an honest belief or a reasonable apprehension that he is in danger of life or limb and the assault is of such a character as to make an attempted retreat hazardous, he may use the necessary force to prevent the threatened injury; and, where one is assaulted at a place where he has a right to be, he need not retreat, but he may stand his ground and defend himself and repel force by force even to the extent of taking life. However, in relation to the law of self-defense, one cannot claim its benefits after he has intentionally placed himself where he knows or believes he will have to invoke its aid. Circumstances justifying assault for the purposes of self-defense must be such as to render it unavoidable. If you believe from the evidence beyond reasonable doubt that the defendant could have avoided any conflict between himself and Robert Preshaw without increasing the danger to himself, it was his duty to avoid such conflict and so render a resort to the law of self-defense unnecessary. The right of self-defense is based upon the broad ground of necessity which is evidenced by a real or apparent exhibition of force, superinducing a reasonable apprehension of imminent danger which justifies the use of force to repel force, but without such necessity the right to resort thereto does not exist. If you find from the evidence in this case that, at the time and place alleged in the information, the defendant had a right to be at the place where the evidence shows him to have been and that he honestly believed himself to be in imminent danger of life or limb or of

great bodily harm at the hands of said Robert Preshaw, whether he was in actual danger or not, and that he was without fault, then I instruct you that it will be your duty to acquit the defendant."

Commenting on the instruction, the appellant, in his brief, uses this language:

"Defendant excepts to instruction No. 10, for the reason that, as stated therein, it leaves the jury to infer that the act of going into the house of T. B. Preshaw on the part of the defendant intended placing himself where he knew or believed he had to invoke the aid of self-defense, and left the jury so to determine. The court erred in failing to tell the jury that the mere act of going to the Preshaw home to get the child was not of itself a crime, or was not doing wrong, and left the jury to conjecture and say that it was criminal to go into the home of another, even though to obtain possession of one's child."

If we understand the appellant, it is meant to be asserted that the instruction left it for the jury to say whether or not the appellant, at the time of the affray, was lawfully at the house where the deceased resided; while, on the contrary, the court should have instructed them that the appellant was lawfully in the house and that he committed no offense in going to the house for the purpose of obtaining possession of his child.

But we think the instruction was as favorable to the appellant as the facts warranted. Conceding that the appellant's right to the custody of the child was superior to the right of the persons with whom the mother of the child had placed it, the appellant had no right to resort to force or violence to obtain its custody. He could lawfully go in a peaceable manner to the house of its possessor and demand the custody of the child, and take it away if consent was given him to do so. Or he could lawfully go to the house and take the child, even without the consent of the persons having its custody, if he could do so in a peaceable manner. But this marks the extent of his right. He, like every one else, must

assert his rights through the lawful channels, through the tribunals which the law has provided for the determination of conflicting rights; he cannot become a law unto himself. So if here, as there was evidence tending to show, the appellant intended to take the child at any hazard, armed himself with a revolver, went to the house of the person in whose custody the child was, and entered the house without warning with the revolver in his hand, his going was not lawful, he was wrongfully in the house, and he could not justify the killing of a person therein on a plea of self-defense, even if an assault was made upon him by such person, no matter how aggravated the assault may have been or how much he may have believed his life to be in danger. He was at least guilty of manslaughter, the crime of which he was convicted. As said by Mr. Wharton:

"If the defendant in any way challenged the fight, and went to it armed, he cannot afterward maintain that in taking his assailant's life he acted in self defense." 1 Wharton, Criminal Law (11th ed.), § 613.

So Mr. McClain, in his work on Criminal Law, § 309:

"One may, by his conduct, put himself so far in the wrong that he is not afterwards excusable for acting in self-defense, even though he is put in peril. If by his wilful, wrongful act, he brings about the necessity for killing to save his own life, he will not be excused. . . . It has even been said that one who provokes a difficulty with abusive language, or seeks a quarrel, will not be excused in defending himself against violence which he has thus incited, though in such case, if his original intention was not to kill or inflict grave bodily injury, the necessity which afterwards arises for taking life may reduce the homicide to manslaughter."

See, also, from our own decisions: *State v. Cushing*, 14 Wash. 527, 45 Pac. 145, 53 Am. St. 883; *State v. McCann*, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216. It was proper, therefore, for the court to leave it to the jury to say whether the defendant was lawfully in the house where the affray occurred, or whether his going to the house was lawful.

The second objection is to the instruction on the question of reasonable doubt. In defining what constituted a reasonable doubt, the court made use of this sentence:

"You are required to decide the question submitted to you, whether the defendant is guilty or not guilty, upon the strong probabilities of the case as disclosed to you by all the evidence given before you."

The sentence formed a part of a somewhat extended instruction, and while, if taken alone, it might be subject to criticism, it becomes harmless when read with its surroundings. It was used along with other sentences in an effort on the part of the court to instill into the minds of the jury the meaning of the phrase "reasonable doubt." While it could properly have been omitted, we are convinced that the jury were in no way misled by it or the appellant prejudiced. A similar use of a similar phrase was noticed by us in *State v. Quinn*, 56 Wash. 295, 105 Pac. 818, and held not to be prejudicial.

The third objection is to an instruction wherein the court told the jury that they were to disregard any statements made by counsel concerning the evidence unless they found the statement to be borne out by the evidence. This did not constitute error. On the contrary, an instruction to the same purport was distinctly approved by us in *State v. Burton*, 27 Wash. 528, 67 Pac. 1097.

We find no substantial error in the record, and the judgment will stand affirmed.

MORRIS, MOUNT, HOLCOMB, and PARKER, JJ., concur.

[No. 13507. Department Two. February 2, 1917.]

CHARLES B. CHALMERS, *Respondent*, v. INDUSTRIAL INSURANCE COMMISSION, *Appellant*.[1]

MASTER AND SERVANT—WORKMEN'S COMPENSATION—AWARD — DISCRETION—REVIEW—APPEAL — STATUTES — CONSTRUCTION. Where the industrial insurance commission made an award of $225 for partial disability on account of an injury to an arm, the amount of an award for permanent disability by loss of an arm being limited to $1,500, an appeal seeking the maximum amount for total disability, involves only a question of the commission's discretion touching the amount of the award, under Rem. Code, § 6604-20, which provides that matters resting in the discretion of the department shall not be subject to review; notwithstanding such section further provides for an appeal, "in so far as such decision rests upon questions of fact," with the further provision that the "calling of a jury shall rest in the discretion of the court;" hence the decision will not be reviewed on appeal except for abuse of discretion.

Appeal from a judgment of the superior court for Whatcom county, Pemberton, J., entered October 11, 1915, upon findings in favor of the plaintiff, reversing on appeal a decision of the industrial insurance commission, denying an award of compensation. Reversed.

The Attorney General and *John M. Wilson* and *Howard Waterman, Assistants*, for appellant.

C. A. Swartz, for respondent.

PARKER, J.—This is an appeal by the industrial insurance commission from a judgment of the superior court for Whatcom county rendered in favor of the claimant, Charles B. Chalmers, upon an appeal from the decision of the commission refusing to grant him an additional award after making an award to him for an injury received in an extra hazardous occupation.

Claimant's left arm was injured in February, 1914, resulting, as he now claims, in permanent partial disability.

[1]Reported in 162 Pac. 576.

He applied to the commission for an award of compensation from the accident fund. Thereafter, in August, 1914, the commission, after due consideration, awarded him $225. He insists that this award was not then made to him as a final determination of the total amount he was entitled to, and that that amount was arrived at by the commission upon the theory that he had lost five months' time from his employment and was entitled to compensation therefor at the rate of $45 a month, amounting in all to $225. Soon thereafter, he insisted upon further allowance, and thereafter, on December 16, 1914, was duly notified by the commission that the award of $225 was final and that his case would not be reopened. No appeal was taken from this final decision of the commission within the twenty days prescribed by the statute, or at all. In March, 1915, he again applied to the commission for an additional award, upon the ground that his injury had become aggravated and amounted to permanent partial disability; evidently relying upon his right to have the case reopened and further considered under subdivision h, section 1 of the workmen's compensation act, Laws 1913, p. 467, being subdivision h, § 6604-5, Rem. Code.

Thereafter, on March 27, 1915, at the request of the commission, he appeared before it and was thoroughly examined by two physicians with the view of determining the nature of his then ailment and its relation to his original injury. On April 14, 1915, the commission, having considered the question of opening the case and awarding him further compensation, rendered its decision refusing to so open the case or award him further compensation, and he was duly notified accordingly. On April 29, within the twenty days prescribed by statute, he appealed from this decision of the commission to the superior court for Whatcom county, that being the county of his residence. The trial in that court without a jury resulted in findings and judgment reversing the decision of the commission, with direction to the commission to further "compensate the plaintiff and make an allowance during such

further time as he is disabled," but leaving the amount to be so awarded to be decided by the commission. From this disposition of the case in the superior court, the commission has appealed to this court.

Upon the trial in the superior court, the testimony of the claimant's physician was the only opinion or expert evidence of any consequence which tended to show that his then existing ailment was of a permanent nature or that it was traceable directly to his injury; while the testimony of four physicians of apparent ability and learning who had thoroughly examined the claimant tended to show that his ailment was not permanent and not traceable to his original injury. The learned trial judge seemed to be of the opinion that, were it a case determinable from this opinion evidence alone, the claimant could not be considered as having sustained his case by a preponderance of the evidence; but, taking into consideration his appearance and certain tests made in the court's presence having to do with the condition of his arm, the court reached the conclusion that he was entitled to further compensation. It seems plain that the claimant's arm, when at rest, is to all outward appearances practically normal as to size, form, color, etc. He seems, however, to have the use of it impaired. This impairment, in the opinion of the physicians who examined him and testified for the commission, was regarded more a result of want of exercise of the arm than from any other cause. His own physician regarded this condition of the arm as one of atrophy or approaching it, though the other four physicians were unable to see any such condition except as it might show some such slight tendency for want of exercise. It also appeared from tests made in the court's presence that the claimant was not sensitive to pin pricks, even though made somewhat vigorously upon his arm. We think it is plain that the present affliction of the claimant falls far short of total permanent disability of his arm; indeed, it does not seem to be so contended, though it may be con-

ceded that there is in some measure a partial permanent disability thereof.

The portion of the workmen's compensation act which it seems necessary to here notice, referring to sections of Rem. Code, are the following:

"Permanent partial disability means the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where ligaments are severed, or any other injury known in surgery to be permanent partial disability. For any permanent partial disability resulting from an injury, the workman shall receive compensation in a lump sum in an amount equal to the extent of the injury, to be decided in the first instance by the department, but not in any case to exceed the sum of fifteen hundred dollars ($1,500). The loss of one major arm at or about the elbow shall be deemed the maximum permanent partial disability. Compensation for any other permanent partial disability shall be in the proportion which the extent of such disability shall bear to the said maximum. . . .

"If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided for the same. . . ." Rem. Code, § 6604-5.

"Any employer, workman, beneficiary, or person feeling aggrieved at any decision of the department affecting his interests under this act may have the same reviewed by a proceeding for that purpose, in the nature of an appeal, initiated in the superior court of the county of his residence . . . in so far as such decision rests upon questions of fact, or of the proper application of the provisions of this act, it being the intent that matters resting in the discretion of the department shall not be subject to review. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. . . . The calling of a jury shall rest in the discretion of the court. . . . In all court pro-

ceedings under or pursuant to this act the decision of the department shall be *prima facie* correct, and the burden of proof shall be upon the party attacking the same." Rem. Code, § 6604-20.

Counsel for the commission contend that the question presented upon these appeals is only one of discretion in the commission and that, therefore, it is not reviewable in the courts, relying upon that portion of § 6604-20 which reads: "It being the intent that matters resting in the discretion of the department shall not be subject to review." Counsel for the claimant contends that the question presented is one of fact, reviewable by a trial *de novo* in the superior court upon such evidence as may be there produced; conceding, however, that the burden of proof is upon an appellant in such cases, in view of the concluding language of § 6604-20, providing that "the decision of the department shall be *prima facie* correct and the burden of proof shall be upon the party attacking the same." In view of the language of that section providing for review in the courts of the decision of the commission "in so far as such decision rests upon questions of fact," and the further provision that "the calling of a jury shall rest in the discretion of the court," the conclusion, it would seem, cannot be escaped that there are some questions of fact which are reviewable in the courts by trial *de novo* upon such evidence as may be there presented. When, however, we are reminded that the commission did make an award of $225 to the claimant because of his injury, and that the amount of the award for permanent partial disability may be in any amount not exceeding $1,500, this case, in its last analysis, seems to involve only the question of the commission's discretion touching the amount of the award which it shall make under the law to the claimant. *Sinnes v. Daggett*, 80 Wash. 673, 142 Pac. 5.

If the commission had found that the claimant was not injured and had never made any award to him, it might be argued with some show of reason that the question of whether

or not he was injured and entitled to an award in some amount would, upon appeal, become a question of fact, triable *de novo* as such in the superior court. We then have, as we view it, nothing more than the question of whether or not the commission so abused its discretion that it in effect failed or refused honestly to exercise it. In other words, whether or not it acted so capriciously and arbitrarily as to warrant the court's interference with its decision. It seems to us that we would have to find such an abuse of discretion before we would have a case warranting such interference by the courts, assuming, for argument's sake, that this discretion of the commission can be interfered with by the courts under any circumstances. We are quite clear that no such showing is made in this case.

We are of the opinion that the court under no view of this case can interfere with the decision of the commission. The judgment of the superior court is reversed, and the decision of the commission is affirmed.

MORRIS, MOUNT, and HOLCOMB, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 13554. Department Two. February 2, 1917.]

BRADY & SON, *Appellants*, v. BEN J. BELL *et al.*, *Respondents*.[1]

SALES — CONDITIONAL SALES—LOGGING ENGINE—"RAILROAD EQUIPMENT"—STATUTES GOVERNING. A conditional sale to a logger of a small twenty-ton locomotive engine, known as a "dinkey" engine, which was shipped on a flat car, and was to be used exclusively on a short logging track, falls within Rem. Code, § 3670, providing that all conditional sales of personal property shall be absolute as to subsequent creditors, unless a memorandum of the sale is filed in the auditor's office of the county where the vendee resides, and not within Rem. Code, § 8741, providing that no contract for a conditional sale of railroad equipment or rolling stock retaining title in the vendor shall be valid against subsequent creditors unless evidenced by an instrument duly acknowledged and filed for record in the office of the auditor of the county in which is situated the principal office of the vendee; since the words "railroad equipment and rolling stock" used in the latter section, apply only to such equipment used by a railroad company acting as a common carrier.

Appeal from a judgment of the superior court for Clarke county, Back, J., entered November 26, 1915, upon findings in favor of the defendants, in an action to recover possession of property levied upon under execution, tried to the court. Affirmed.

D. E. Hardin (*R. Sleight*, of counsel), for appellants.

R. C. Sugg, for respondents.

MORRIS, J.—Appellants seek in this proceeding to establish an adverse claim to property levied upon under an execution in favor of Bell and against Dietderick & Studer. The property in question is a small twenty-ton locomotive, and was purchased by Dietderick & Studer from appellants June 1, 1915, under a conditional sale contract, providing for deferred payments and that title should remain in the vendors until all payments were fully made. Delivery was made June 5th, and on June 21st the contract was received by

[1]Reported in 162 Pac. 865.

the county auditor, filed and indexed as a conditional sale contract.

The decisive question on this appeal is whether, as held by the lower court, the controlling statute is Rem. Code, § 3670, providing that all conditional sales of personal property shall be absolute as to subsequent creditors and others unless a memorandum of the sale is filed in the auditor's office of the county wherein the vendee resides within ten days after the taking of possession by the vendee, or Rem. Code, § 8741, providing that no contract for the conditional sale or lease of railroad equipment or rolling stock, retaining title in the vendor or lessor until payment is fully made, shall be valid against subsequent judgment creditors or purchasers for value without notice unless the same shall be evidenced by an instrument duly acknowledged and filed for record in the office of the auditor of the county in which is situated the principal office of the vendee or lessee. If § 3670 controls, the judgment is right. If § 8741 applies, the judgment is wrong.

The record further describes the engine as a small engine such as is used by loggers in their operations in getting out timber, too small and too light for general railroad use. It was billed to Dietderick & Studer as a "dinkey" engine, and shipped to them on a flat car. Dietderick & Studer were at the time engaged in logging, and as part of their operations had constructed a track three-quarters of a mile in length connecting the Northern Pacific Railway Company track with the timber in which they were operating. The engine was used exclusively on this track.

Section 8741 is part of the Territorial act of 1883 (Laws 1883, p. 62), entitled "An act relating to certain contracts for the conditional sale or lease of railroad equipment and rolling stock, and providing for the recording thereof." This act is plainly indicative of an intention to include only "railroad equipment and rolling stock," as such words are ordinarily used and understood. The word "railroad," when

used in a statute and not otherwise qualified, save for those variant decisions in which it is sought to determine whether or not street railways are included, is generally held to refer to those larger and permanent lines or systems which extend from town to town, or city to city, falling within the well known term of "common carriers," although in construing such phrases as "fellow servants," "assumption of risk" and other like terms relating to employees, cases can be found extending the rule to railroads engaged exclusively in logging operations. However this may be as applied to present day legislation, looking backward to the railroad situation as it existed in the Territory of Washington in 1883, it is almost conclusive that the legislative intent expressed in this act of 1883 was to enact legislation affecting railroads as that term was then understood, and embracing only steam or commercial railroads.

No cases construing a statute similar to § 8741 are cited in either brief, and an independent research has disclosed but one. *In re Ferguson Contracting Co.*, 183 Fed. 880, where, in determining the right of possession to certain locomotives as between the vendors in a conditional sale or lease and the receiver in bankruptcy, it was held that the words "railroad equipment and rolling stock," as found in the New York statute providing that such equipment when sold or leased under agreements that title should remain in the vendor or lessor until payment of the purchase price shall be invalid as to subsequent judgment creditors unless the contract was in writing, fully acknowledged and recorded in the office of the county clerk or register of the county in which was located the principal office or place of business of the vendee or lessee, were equivalent to the words "rolling stock used on a railroad," and applied only to railroads operating as common carriers. The New York statute contains a further provision similar to that found in § 8741, that each locomotive or car so sold shall have the name of the vendor or lessor plainly marked on each side. These two statutes are the

same. They were both enacted in the same year—1883. It is evident they were both enacted for the same purpose, to place railroad equipment and rolling stock in a different position than other chattels conditionally sold. In ascertaining that purpose, Judge Hand, district judge, who writes the opinion in the *Ferguson* case, finds two considerations which seem adequate. First, because railway mortgages of rolling stock were at that time recorded as real estate mortgages, and second, because bondholders with after acquired property clauses could not protect themselves against secret vendors' liens upon new rolling stock necessarily substituted when the old stock wore out.

Whether or not these considerations, or either of them, induced the Territorial legislature to pass this act of 1883 is conjectural, although, as in New York, the second reason given by Judge Hand would apply with much force to conditions then existing in this new country. At all events, we believe the same construction should be applied to our statute as to the New York statute and accordingly hold that the words "railroad equipment and rolling stock" used in § 8741 apply only to such equipment in use by a common carrier or railroad company engaged in hauling passengers or freight for hire, and has no application to small locomotives used only in logging operations. This leaves the sale subject to the conditions of § 3670. There is no contention that its provisions were complied with.

The judgment is affirmed.

MOUNT, PARKER, HOLCOMB, and FULLERTON, JJ., concur.

[No. 13555. Department One. February 2, 1917.]

S. J. CERVIEN *et al.*, *as Cervien & Miller, Respondents*, v. ERICKSON CONSTRUCTION COMPANY, *Appellant*.[1]

RAILROADS—CONSTRUCTION—CONTRACTS—"GRUBBING." "Grubbing" in a railroad construction contract means taking out the roots, stumps and obstacles imbedded in the surface of the ground along the right of way, except where not required on account of cuts and fills; and where, under the contract, the cuts referred to were to be of more than three feet, and the fills of more than two feet, the contractor cannot be allowed for work on stations already cleared in which the cuts and fills exceeded the stipulated requirements; since there was no grubbing to be done on such stations.

SAME—CONSTRUCTION — CONTRACTS — DECISION OF ARBITRATOR. A provision in the contract for grubbing railroad right of way that the chief engineer of the company shall be the final arbiter of all disputes under the contract, is conclusive and binding unless the decision of the arbitrator has been made arbitrarily and capriciously.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 18, 1916, upon findings in favor of the plaintiffs, in an action on contract, tried to the court. Reversed.

Corwin S. Shank and *H. C. Belt*, for appellant.

Jay C. Allen (*Eimon L. Wienir*, of counsel), for respondents.

PER CURIAM.—Action to recover upon a subcontract for grubbing in the construction of the Seattle, Port Angeles & Lake Crescent Railway Company. The contract under which respondents undertook to grub forty stations, in so far as it is material to our inquiry, is as follows:

"(10). The first party further agrees that it will, within ten (10) days after the certificate and estimate shall have been procured by it, as in this section provided for, pay to

[1]Reported in 162 Pac. 567.

the subcontractor the sum shown by such certificate to be due, at the following rates and prices, viz:

Earth or common excavation, per cubic yard..$ .28
Clearing, per acre.....
Grubbing per One Hundred (100) feet..... 18.00

. . . When the entire work hereinbefore specified to be done by the subcontractor has been entirely finished and completed to the satisfaction and acceptance of the first party and the chief engineer of said railway company, the first party shall obtain from said chief engineer a certificate to that effect, together with a final estimate of the amount and value of the various kinds of work done by the subcontractor under the terms of this agreement, and it is mutually agreed by and between the parties hereto that such estimate shall be final and conclusive, and within thirty days after said certificate and estimate shall have been furnished by the chief engineer, the first party will pay to the subcontractor the sum or sums, if any, which may be due him under this contract agreeable to said estimates, together with the fifteen per cent above referred to, and any and all other percentages by it retained as aforesaid; and such payment shall be in full settlement for all work done by the subcontractor under the terms of this agreement.

"(12). . . . When any work, for which no price is specified herein, shall be done by the subcontractor at the request of the chief engineer of said railway company, the subcontractor shall be entitled to a price therefor, to be fixed and determined by said chief engineer.

"(13). It is further mutually understood and agreed that in case any dispute or misunderstanding shall arise between the parties hereto in relation to any of the covenants or stipulations contained herein, or to their performance by either of said parties, the chief engineer of the said railway company shall be and he is hereby made an umpire to decide all such questions, and his decision on any question or matter touching this contract shall be final and conclusive between the parties hereto, and each of them hereby waives any and all right of action at law or otherwise, and agrees to be bound by the decision of said chief engineer. . . .

"(21). It is further mutually understood and agreed that the subcontractor shall be paid at the stipulated rates only

for work done as required by the plans, profiles, specifications and instructions of the chief engineer."

When the subcontract was completed, a dispute arose as to the number of stations respondents had grubbed. Respondents claimed they were entitled to forty stations, while the district engineer refused to allow more than twelve. As provided for in § 13 of the contract, the controversy was taken to the chief engineer of the railway company, who allowed respondents for eighteen stations. Still dissatisfied, respondents brought this action and obtained a judgment, from which this appeal is taken.

The case presents two questions. First, one of fact. What is grubbing? Second, one of law. Is the decision of the chief engineer conclusive? Grubbing is a word of simple meaning, and no difficulty should be encountered in defining it. Referable to both lexicographers and common usage, it means taking out the roots, stumps and obstacles imbedded in the surface of the ground along the right of way, except where not required on account of cuts or fills; the cut and fill rule used in this case being cuts of more than three feet and fills of more than two feet. The ground covered by this subcontract had already been cleared under another contract, so that where fills were required all it would be necessary for respondents to do under their grubbing contract would be to cut the stumps of trees off sufficiently close to fall within a two-foot fill. In cases of cuts of more than three feet, the stumps, roots, stones and other obstacles would be removed as a part of the excavation work. From a profile map in evidence, as explained by the engineer in charge of the work, it would appear that, if respondents were allowed for grubbing every station where a cut is three feet or less or a fill did not exceed two feet, they would not be entitled to a greater number of stations than allowed by the chief engineer.

The lower court seems to have lost sight of the fact that grubbing would not be required on stations showing cuts

exceeding three feet or fills exceeding two feet, for respondents were allowed to recover for grubbing station 193, having a fill of 7 feet; stations 194 to 196, where there was a cut running from 6 to 20 feet; station 197, having a fill of 7 feet; stations 198 to 200, having a fill of from 2 to 9 feet; station 201, having a cut of 4 feet; station 202, having a fill of 8 feet; station 203, having a fill of between 4 and 5 feet; station 204, having a cut of 7 feet; stations 206 to 208, having a fill running from 5 to 30 feet; stations 210 to 214, having a cut running from 5 to 30 feet; station 216, having a cut of 6 feet; station 217, having a fill of 4 feet; stations 218 to 222, having a cut from 5 to 25 feet; stations 224 to 225, having a cut of 5 feet; and station 230, having a fill of 4 feet. At these stations the roadbed is from 16 to 22 feet wide, built on a hillside with sometimes a cut on one side and a fill on the other, the figures given being taken from the center line. We cannot understand upon what theory grubbing should be required or allowed on stations showing such cuts and fills. If, as one of the respondents testified, they sawed off tops of trees upon stations where fills would be made, they might be entitled to a charge against appellant under § 12 of the contract as work required for which no price was fixed, but cutting off tree tops could hardly be classified as grubbing. For these reasons, we conclude the judgment cannot be sustained upon the facts.

There is, however, another reason from which there is no escape, and that is, under the contract the chief engineer is made the final arbiter of all disputes of this character. This provision, when found in a contract, has uniformly been recognized as binding and conclusive upon all parties, except where the award of the arbitrator shows it to have been arbitrarily or capriciously made. There is no such finding in this case, nor is there anything disclosed in the record upon which to base such a finding. The lower court simply substituted its judgment for that of the chief engineer. That cannot be done. For this reason alone the judgment must

be reversed. We have reviewed the facts simply to show that the award of the chief engineer of the railway company was neither arbitrary nor capricious.

The judgment is reversed.

[No. 13607. Department Two. February 2, 1917.]

PUGET SOUND STATE BANK, *Appellant*, v. WASHINGTON PAVING COMPANY *et al.*, *Respondents*.[1]

SET-OFF AND COUNTERCLAIM—BILLS AND NOTES — BANK DEPOSIT. Both at common law and under Rem. Code, §§ 264-266, in a bank's action upon notes given for a deposit credit, the depositor is entitled to offset the amount of the deposit and thus satisfy the debt, if it did not exceed the deposit credit.

BILLS AND NOTES—NEGOTIABILITY—MATURITY—OPTION — STATUTES —CONSTRUCTION. A note containing a provision that it shall become due and payable on demand at the option of the payee when it deems itself insecure, is not negotiable, under Rem. Code, § 3392, providing that an instrument to be negotiable must be payable on demand or at a fixed or determinable future time, which, by Id., § 3395, means at a fixed period after the occurrence of a specified event which is certain to happen though the time of happening be uncertain; that section further providing that an instrument payable upon a contingency is not negotiable.

SAME—NEGOTIABILITY—DEMAND NOTES. Such a note with a reserved power in the payee to declare it due before the stated time of maturity is not negotiable as a demand note under Rem. Code, §§ 3392 and 3444.

SAME—HOLDER IN DUE COURSE—DELIVERY WITHOUT INDORSEMENT. The transferee of a note by delivery without indorsement is not a holder in due course, in view of Rem. Code, § 3440, providing that, by such delivery, he acquires the right to an indorsement, but for the purpose of determining whether he is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

SET-OFF AND COUNTERCLAIM—NOTES—BANK DEPOSIT—"DEMAND"—STATUTES. A company's deposit credit in a bank, given in consideration of notes to the bank, is such an existing "demand" or cause of action as can be set off against the amount due upon the notes, after

[1]Reported in 162 Pac. 870.

transfer to one who is not a holder of the notes in due course, although no demand had been made on the bank at the time of the transfer of the notes; in view of Rem. Code, § 266, providing that a defendant in a civil action upon contract may set off a "demand" of like nature against the plaintiff which existed and belonged to him at the time of the commencement of the action, and also against an assigned note, negotiated in good faith, provided such demand existed at the time of the assignment and belonged to the defendant in good faith before notice of the assignment, and might have been offset against the person originally liable.

SAME. Such a deposit credit at least becomes a matured demand upon the insolvency of the bank.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered February 9, 1916, upon findings in favor of the defendants, in an action on promissory notes, tried to the court. Affirmed.

Hudson, Holt & Harmon and *Walter M. Harvey*, for appellant.

Hayden, Langhorne & Metzger, for respondents.

PARKER, J.—The Puget Sound State Bank seeks recovery upon two promissory notes executed by the defendant Washington Paving Company, payable to its own order, thereafter transferred by it to the Olympia Bank & Trust Company by indorsements making them payable to its order, and thereafter transferred by that bank by delivery only, without indorsement, to the plaintiff. George Milton Savage and D. I. Cornell were made defendants because they indorsed the notes at the time they were transferred by the Washington Paving Company to the Olympia Bank & Trust Company. Trial in the superior court without a jury resulted in findings and judgment in favor of the defendants, upon the ground that, while the notes evidenced legal obligations of the defendants, they were entitled to set off against the amount due thereon to the plaintiff a greater amount which was owing to the Washington Paving Company from the Olympia Bank & Trust Company upon a deposit credit

at the time of the transfer of the notes by that bank to the plaintiff. From this disposition of the case, the plaintiff has appealed to this court.

Appellant, Puget Sound State Bank, has been, at all times here involved, a banking corporation of this state engaged in the banking business in the city of Tacoma, with H. N. Tinker as its president and manager. We shall hereafter refer to it as the Puget Sound Bank. Respondent Washington Paving Company is a corporation of this state engaged in street paving and other contract work, and, at the time of the execution of the notes in question, had a contract for the paving of certain streets in the city of Olympia. Respondent George Milton Savage was then, and is now, its president and manager. We shall hereafter refer to it as the paving company. The Olympia Bank & Trust Company was, at the time of the execution and transfer of the notes in question, a banking corporation of this state engaged in the banking business, in the city of Olympia, with W. D. Hayes as its cashier and manager. We shall hereafter refer to it as the Olympia Bank. It ceased to do business, because of its insolvency, on September 22, 1914.

About September 2 or 3, 1914, Mr. Hayes, cashier of the Olympia Bank, knowing that the paving company was about to enter upon the execution of a large paving contract in Olympia, solicited Mr. Savage, its president, to open an account and do its banking business with the Olympia Bank. The conversations occurring between Mr. Hayes and Mr. Savage at that time, and a few days later when the notes were executed, constitute an agreement with reference to which the trial court found as follows:

"At the time of the discount of said notes by the Olympia Bank & Trust Company, it was agreed between said bank and the Washington Paving Company that the same should be held by the Olympia Bank & Trust Company and not sold, hypothecated or otherwise disposed of to any other bank or banker without first notifying the Washington Paving Company and giving the Washington Paving Company an op-

portunity to pay said notes, or the one of them proposed to be sold, hypothecated or otherwise disposed of."

This finding, we think, is amply supported by the evidence. Indeed, it seems not to be seriously disputed by Hayes or any other witness. In pursuance of this agreement, on September 5, 1914, at the Olympia Bank, four notes for $5,000 each, payable ninety days after date, with seven per cent interest, after maturity, were executed by respondent paving company by Savage, its president, the notes being made payable to its own order and immediately transferred to the Olympia Bank by indorsement making them payable "to the order of Olympia Bank & Trust Co." Thereupon the paving company was given credit as a general depositor of the Olympia Bank for the sum of $20,000, less the amount of discount charged by the bank. This was the only deposit ever made by the paving company with the Olympia Bank. We have, then, as this single transaction, united in all its parts, the execution of the notes; their transfer to, and discount by, the Olympia Bank; the agreement on the part of that bank not to transfer them; and the deposit credit given to the paving company for the proceeds of the notes less the discount charge. Each of these notes contains, among other provisions, the following: "This note shall become due and payable on demand at the option of the payee, when it deems itself insecure." Up to and including September 22, 1914, the paving company had drawn checks upon its deposit credit in the Olympia Bank reducing that credit to approximately $9,650. One of these checks, constituting nearly the whole of such reduction, was given to the Olympia Bank for the surrender of two of the notes on that day. This balance has never been further reduced, and is now claimed by the paving company as an off set against, and as greater in amount than, the balance due the Puget Sound Bank upon the notes.

On Saturday, September 19, 1914, the Olympia Bank became indebted by overdraft to its Tacoma correspondent, the Puget Sound Bank, in the sum of approximately $3,600.

Thereafter on that day, in a telephone communication, Mr. Hayes of the Olympia Bank promised Mr. Tinker of the Puget Sound Bank that this overdraft would be cared for "either with exchange or in a manner satisfactory to" the Puget Sound Bank. But in no communication between the banks or their officers on that day was reference made to the notes of the paving company, all of which were still held by the Olympia Bank. On Monday, September 21, at about eight o'clock in the morning, Mr. Tinker again called Mr. Hayes by telephone, informing him that nothing had yet come to the Puget Sound Bank from the Olympia Bank to take care of this overdraft. It was then agreed that the Puget Sound Bank would purchase one of the paving company's notes from the Olympia Bank. Mr. Hayes accordingly then sent by mail to the Puget Sound Bank not only the note agreed to be purchased, but also the three other notes. None of these notes were ever indorsed by the Olympia Bank, so that they were acquired by the Puget Sound Bank by delivery only. About noon on that day, the Puget Sound Bank received from the Olympia Bank a telegram requesting that $2,000 in gold be sent to it. The paving company's notes had not yet arrived at the Puget Sound Bank and Mr. Tinker called Mr. Hayes by telephone and so informed him, and reminded him that the $5,000 note agreed to be purchased would not cover the then existing overdraft and $2,000 additional. Mr. Hayes then informed Mr. Tinker that he had sent not only the note which was agreed to be purchased by the Puget Sound Bank, but also the other three notes of the paving company, requesting that they be retained until the Puget Sound Bank should otherwise be reimbursed. Soon thereafter, early in the afternoon, the four notes were received by the Puget Sound Bank through the mail. When the notes were received, Mr. Tinker called Mr. Savage of the paving company by telephone, when a conversation was had between them, concerning which Mr. Savage testified as follows:

"I was called to the telephone and the man at the other end said he was Mr. Tinker of the Puget Sound State Bank, and wanted to know if we had executed some notes and deposited with the Olympia Bank & Trust Company; I told him we had, that we had executed four $5,000 notes. He said, 'Have you received the money?' I said, 'Not exactly; we have received credit in the bank, and checked out less than $200.' That was all the conversation we had in regard to the notes."

There is some conflict between the testimony of Mr. Savage and Mr. Tinker as to the purport of that conversation; but we feel constrained to believe that Mr. Savage did not then make any statement that would lead Mr. Tinker to believe that the paving company had no defense or off set against the notes as against the Olympia Bank, nor any statement which Mr. Tinker could rightly construe as a consent of the paving company that the Puget Sound Bank might acquire the notes. Two of the notes were sent back to the Olympia Bank that afternoon, one being retained as purchased by the Puget Sound Bank, and the other retained by it to secure the overdraft which would be caused by sending the $2,000. Thereafter, late that afternoon or early the next morning, the Puget Sound Bank shipped to the Olympia Bank $2,000 in gold as requested. So that, as claimed by the Puget Sound Bank, there then became owing to it the whole of the note which it claimed to have so purchased and approximately $700 upon the overdraft secured by the other note. About ten o'clock the next morning, Tuesday, the 22d, Mr. Savage went to the Puget Sound Bank and asked Mr. Tinker if it then had the notes, when he was informed that it had two of them, having returned the other two to the Olympia Bank. Mr. Savage then protested to Mr. Tinker against the Puget Sound Bank thus acquiring the notes, informing him that payment of them would be resisted as if they were held by the Olympia Bank. He then went to Olympia, where he had a somewhat strenuous session with Mr. Hayes relative to the Olympia Bank transferring the notes to the Puget Sound Bank, the details of which are not material here, and at that

time took up the two notes which had been returned to the Olympia Bank, by giving the paving company's check against its deposit credit in that bank, which resulted in that deposit credit being reduced to approximately $9,650, which, it will be seen, is more than sufficient to satisfy the claim of the Puget Sound Bank if allowed as a set-off.

There is considerable testimony in the record relative to the insolvency of the Olympia Bank and as to when it actually became insolvent. This testimony came into the record in an effort on the part of counsel for respondent to show that the Olympia Bank was insolvent at the time it transferred the notes to the Puget Sound Bank, and to bring home to the Puget Sound Bank knowledge of such insolvency at that time. There is much in this evidence that suggests actual insolvency at that time and the Puget Sound Bank's knowledge thereof, or at least knowledge of such facts as to put it upon inquiry touching such insolvency. It is sufficient, however, for our present purpose to know that the Olympia Bank was insolvent upon the closing of business on September 22d, and that it closed its doors and went into the hands of the state bank examiner on the morning of September 23d without opening for business on that day. The two notes in question matured December 5, 1914, and thereafter appellant, Puget Sound Bank, commenced this action for recovery thereon.

It hardly needs argument or citation of authorities to demonstrate that, if the Olympia Bank, instead of the Puget Sound Bank, was still the holder of and seeking recovery upon these notes, respondent paving company could offset against the debt evidenced thereby the amount due to it upon its deposit credit in the Olympia Bank, and thus satisfy such debt if it did not exceed the amount of such deposit credit. Our statute relating to counterclaim and set-off, and the most elementary principles of law, at once renders this apparent, since the paving company's debt, evidenced by the balance due upon the notes, and the Olympia Bank's debt, evidenced by the deposit credit, would be mutual as between

the Olympia Bank and the paving company. Our problem then is, Is the Puget Sound Bank wholly in the shoes of the Olympia Bank? If this question be answered in the affirmative, manifestly the Puget Sound Bank cannot recover in this action, because the amount due it upon these notes is less than the amount of the deposit credit of the paving company in the Olympia Bank. Rem. Code, §§ 264, 265, 266.

Are the notes negotiable in the sense that their transfer to the Puget Sound Bank destroyed the defense of set-off invoked by the paving company? We have seen that each of the notes contains this provision: "This note shall become due and payable on demand at the option of the payee when it deems itself insecure." In our negotiable instruments act we read:

"An instrument to be negotiable must conform to the following requirements: . . . 3. Must be payable on demand, or at a fixed or determinable future time;" Rem. Code, § 3392.

"An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable— . . . 3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

"An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect." Rem. Code, § 3395.

These provisions, we think, answer this question according to the contention of counsel for respondents. We think the word "contingency," as here used, refers to contingency as to time, though it may also refer to other contingencies. Let us, however, look to the law as found in the decisions of the courts, of which, after all, these statutory provisions are only declaratory. We note here that the above quoted provision in these notes gives the Olympia Bank, the payee, the unrestricted power to declare the notes due at any time before maturity, and that the right to exercise such power possessed by the payee is not dependent upon, nor does it grow out of,

any act, promise or agreement of the paving company, the maker of the notes. In other words, it is a contingency over which the maker of the notes has no control.

In *Brooks v. Hargreaves*, 21 Mich. 254, there was under consideration the question of the negotiability of a note which, while providing for payment one year after date, contained also the following:

"To be paid when any dividends shall be declared on such shares as Joseph Smith has been holding heretofore in the Agricultural and Broom Handle Manufacturing Company."

Chief Justice Campbell, speaking for the court, while recognizing that the note would, in any event, become payable at the end of the year, held that the contingency specified in the above quoted portion of the note was so uncertain as to time of payment as to render the note nonnegotiable, and observed:

"As the note on either hypothesis might have become payable at a time which could not be made certain by any attainable means, it cannot be regarded as a promissory note. That must be payable at a time which must certainly arrive in the future, upon the happening of some event or the completion of some period not depending on the future volition of any one. The maturity of this instrument was liable to be hastened or postponed by the action of the corporation."

In *First Nat. Bank v. Bynum*, 84 N. C. 24, 37 Am. Rep. 604, the court had under consideration a note containing this provision:

"The express condition of the sale and purchase of the engine separator for which this note is given, is such, that the title, ownership or possession does not pass from the said Taylor Manufacturing Company of Westminster, and said company have full power to declare this note due and take possession of said engine separator at any time they may deem this note insecure, even before the maturity of the same."

Justice Ashe, speaking for the court and holding that this was a nonnegotiable note, said:

"But there is another serious objection to the claim set up for the negotiability of this instrument. It stipulates that the payees shall have full power to declare the note due at any time they may deem the note insecure, even before the maturity of the same. This divests it of the quality of certainty in the time of payment, which as has been shown is one of the essential elements of negotiability. The time of payment may be hastened at the option of the payees, and is therefore uncertain. And it has been held in Michigan that it is essential to a promissory note that it be payable at a time that must certainly arrive in the future, upon the happening of some event, or the completion of some period, not depending upon the volition of any one. *Brooks v. Hargreaves*, 21 Mich. 254."

In *Carroll County Sav. Bank v. Strother*, 28 S. C. 504, 518, 6 S. E. 313, there was under consideration a similar note given as the purchase price of an engine and sawmill, the title of which was to remain in the seller until payment of the note. The note contained a provision that the payee has "full power of declaring this note due, and take possession of said engine and sawmill, at any time they may deem this note insecure, even before the maturity of the same." Holding that this right of the payee to declare the note due at any time rendered it nonnegotiable, Justice McIver, speaking for the court, said:

"As to the other stipulation whereby the payee is invested with authority to declare the so-called note due whenever it is deemed insecure, it seems to us clear that it is sufficient, not only to deprive the paper of its negotiability, but also of its character as a note; for it renders the time of payment altogether uncertain, and dependent only upon the option of the payee."

In *Reynolds v. Vint*, 73 Ore. 528, 144 Pac. 526, a similar note was held nonnegotiable, wherein Chief Justice McBride, speaking for the court, said:

"A note providing, as the note in suit does, that whenever Reynolds or his agents deem the note insecure they shall

have power to declare it due, even before maturity, is nonnegotiable."

In *Holliday State Bank v. Hoffman*, 85 Kan. 71, 116 Pac. 239, Ann. Cas. 1912D 1, 35 L. R. A. (N. S.) 390, there was involved a note accompanied by collateral security specified therein, and containing the following:

"If, in the judgment of the holder of this note, said collateral depreciates in value, the undersigned agrees to deliver when demanded additional security to the satisfaction of said holder; otherwise, this note shall mature at once."

While recognizing that the note was nonnegotiable because of the promise to furnish additional security to the satisfaction of the payee, it was also held nonnegotiable because of the right of the holder to cause the note to mature at any time, Justice Porter, speaking for the court, observing:

"The note is nonnegotiable for the further reason that the same provision renders doubtful and uncertain the time at which it shall become due. If the maker shall fail when demanded to furnish additional security to the satisfaction of the holder, the note shall mature at once. It is argued that this is no different in principle from the provision that default in the payment of any installment shall accelerate the maturity of the note, and cases are cited in which we have held that a similar provision will not render the note nonnegotiable. (See *Clark v. Skeen*, 61 Kan. 526.) The negotiable instruments law itself expressly declares that a negotiable instrument may contain provisions of this kind. (Gen. Stat. 1909, §§ 5255, 5257.) The distinction between such a stipulation and the one in question lies in the fact that in the one instance the maturity is accelerated by the default of the maker alone and the default is to consist in his failure to pay money. Here the maturity of the note is to be accelerated by the failure of the maker to do something in addition to the payment of money, and both contingencies are made to depend upon something over which he has not the absolute control. It is within the power of the holder by refusing to assent to what the maker has done arbitrarily to make the note due at any time between the date of its execution and six months thereafter. If the holder is not

satisfied with the additional security the note matures at once, and thus the time at which it may mature would depend upon the time at which the holder declared himself dissatisfied with the security delivered by the maker. The effect of this stipulation is to leave the time when payable uncertain and indefinite."

In *Kimpton v. Studebaker Bros. Co.*, 14 Idaho 552, 94 Pac. 1039, 125 Am. St. 185, the note involved contained a similar provision giving the payee the uncontrollable option to declare it due before its stated date of maturity; and while it contained other provisions which may be considered as rendering it nonnegotiable, it was held that this option of the payee rendered it nonnegotiable.

It is true that the decisions above noticed, other than the Michigan case, relate to notes accompanied by some claim to or lien upon specified property as security, but it seems clear that in all of them the right of the payee of the note to declare the same due before maturity upon his deeming himself insecure was the controlling fact rendering the notes nonnegotiable. In other words, the question of the time of payment of the note, in each of those cases, was dependent absolutely upon the will and election of the payee of the note. That is, it was "dependent on the future volition of" one other than the maker of the note, paraphrasing the language of Chief Justice Campbell, above quoted from *Brooks v. Hargreaves*. Such is the option of the Olympia bank as to these notes. In *Bright v. Offield*, 81 Wash. 442, 450, 143 Pac. 159, we recognized this as being the correct doctrine, though the exact point was not there involved.

It might be contended that these notes, by reason of the power of election on the part of the payee as to their maturity, became in effect demand notes and were, therefore, negotiable under Rem. Code, § 3392, above quoted, and that, being transferred to appellant, Puget Sound Bank, within a reasonable time after their execution, they would be freed

from equitable defenses of the maker, as apparently is contemplated as to demand notes by Rem. Code, § 3444. We think, however, the authorities above noticed answer any such contention and render it clear that the making of the notes payable at a certain time, with the reserved power to the payee to declare them due before the stated time of maturity if he deems himself insecure, does not make them demand notes within the meaning of §§ 3392 and 3444. We feel constrained to hold that these notes are not negotiable and are, therefore, subject to any defense the paving company may have against them which existed at the time of their transfer to the Puget Sound Bank.

Aside from the question of the negotiability of the notes in form, did not their transfer to the Puget Sound Bank by the Olympia Bank, without indorsement and by delivery only, render them subject to defenses the paving company might have against them in the hands of the Olympia Bank? This question seems to be answered in the affirmative by Rem. Code, § 3440, as follows:

"Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires, in addition, the right to have the indorsement of the transferrer. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made."

This is but a statutory declaration of the general rule. 8 C. J. 388; *Trust Co. v. National Bank*, 101 U. S. 68. Plainly the Puget Sound Bank never acquired the notes "in due course," so far as the rights of the paving company are concerned, nor is the Puget Sound Bank aided in this particular by the fact that the notes were transferred to the Olympia Bank by indorsement of the paving company instead of by being made payable directly to the Olympia Bank, since that indorsement made them payable "to the order of the Olympia

Bank & Trust Co.", and they are upon their face made payable "to the order of Washington Paving Co." So they never became payable to bearer so as to be capable of passing their title by delivery only and freeing them from equitable defenses in the hands of the Puget Sound Bank.

Was respondent paving company's deposit credit in the Olympia Bank such an existing demand or cause of action, at the time of the transfer of the notes by the Olympia Bank to the Puget Sound Bank, as can be set off against the amount due upon them in the hands of the Puget Sound Bank? That such deposit credit was then an existing demand in favor of the paving company against the Olympia Bank in the sense that it was then at least an existing unmatured debt of the Olympia Bank to the paving company, is plain. Counsel for the Puget Sound Bank insist that, since at that time no demand had been made by the paving company of the Olympia Bank for the payment of such debt, it was not then a matured cause of action and, for that reason, incapable of being set off against the amount due upon the notes in the hands of the Puget Sound Bank. In other words, that whatever the right of set-off might be in favor of the paving company as against the Olympia Bank, no set-off can be invoked as against the Puget Sound Bank except such as constituted a perfect and matured cause of action in favor of the paving company and against the Olympia Bank at the time of the transfer of the notes to the Puget Sound Bank; even though the notes are not negotiable and were transferred without indorsement and by delivery only. Counsel invoke the general rule that a general deposit credit does not become a matured cause of action in favor of the depositor until demand therefor by the depositor, from which it is argued that, for want of such demand by the paving company before the transfer of the notes to the Puget Sound Bank, the paving company had no cause of action against the Olympia Bank which was then or thereafter available as an offset as against the Puget

Sound Bank. This contention we think is answered adversely to appellant by Rem. Code, § 266, reading as follows:

"The defendant in a civil action upon a contract expressed or implied, may set off any *demand* of a like nature against the plaintiff in interest, *which existed and belonged to him at the time of the commencement of the suit.* And in all such actions, other than upon a negotiable promissory note or bill of exchange, negotiated in good faith and without notice before due, which has been assigned to the plaintiff, he may also set off a demand of a like nature existing against the person to whom he was originally liable, or any assignee prior to the plaintiff, of such contract, *provided such demand existed at the time of the assignment thereof, and belonging to the defendant in good faith, before notice of such assignment, and was such a demand as might have been set off against such person to whom he was originally liable.* . . ."

We have italicized the words of this section particularly to be noticed, and specially to call attention to the fact that the word "demand" and not "cause of action" is used as descriptive of the claim which may be available to a defendant as a set-off. It seems plain to us that the deposit credit was a "demand" within the meaning of this section, existing and belonging to the paving company at the time of the transfer of the notes to the Puget Sound Bank, though possibly it was not then a matured cause of action for want of demand for its payment. Of course, it existed before the paving company had notice of the transfer of the notes to the Puget Sound Bank, because it existed before that transfer. It is equally plain that it is a demand which could have been set off against the Olympia Bank had it been seeking recovery upon the notes, as we think the mere demanding of it to be so set off would have made it a matured cause of action as against the Olympia Bank, though a mere claim of set-off in this case would not of itself make it a matured cause of action as against the rights of the Puget Sound Bank. It might well be argued that, when the Olympia

Bank breached its agreement with the paving company by the transfer of the notes to the Puget Sound Bank, that fact, in any event, matured the paving company's deposit credit in that bank as a cause of action without demand, so as to render such deposit credit immediately available to the paving company as an offset to the notes, as against any holder thereof, they being nonnegotiable and transferred by delivery only. But however that may be, that deposit credit, in any event, became a matured demand and cause of action upon the insolvency and closing of the doors of the Olympia Bank, which occurred long before the commencement of this action. 3 R. C. L. 568; 7 C. J. 664. It seems plain to us, therefore, that, since the paving company's deposit credit in the Olympia Bank was a "demand" within the meaning of § 266, above quoted, existing in favor of the paving company at the time of the transfer of the notes to the Puget Sound Bank, and at least became a matured cause of action before the commencement of this action, and it being a demand greater than the total amount due upon the note purchased by the Puget Sound Bank and the amount secured to it by the transfer of the second note, such demand became available to the paving company as a complete defense by way of set-off against the claims of the Puget Sound Bank upon the notes.

The California court in *St. Louis Nat. Bank v. Gay*, 101 Cal. 286, 35 Pac. 876, has held in harmony with the conclusion we here reach, under a statute which refers to the claim which may be set up in defense as a "*cause of action.*" At page 290, Justice McFarland, speaking for the court, said:

"By section 438 of the Code of Civil Procedure in an action on contract the defendant may set up any cause of action arising upon contract, and 'existing *at the commencement of the action.*' If Dare had kept his note and sued on it in August, 1892, respondent could unquestionably have set off the Collins note; and it seems a clear proposition of law, under the sections of our code above stated, that in an

action by the assignee of a chose in action not negotiable, the defendant may successfully plead any set-off which he could have so pleaded against the assignor if he had retained and brought suit on it, provided he acquired it before notice of assignment, and provided further that it was 'existing at the commencement of the action.' It is contended that at the time of the notice of assignment the Collins note was not an 'existing' setoff because it was not then quite due, and therefore not presently suable. But the thing itself—the note, the chose in action—was then existing; and it was pleadable by counterclaim when this action was commenced."

We conclude that the judgment must be affirmed. It is so ordered.

MORRIS, HOLCOMB, MOUNT, and FULLERTON, JJ., concur.

[No. 13609. Department One. February 2, 1917.]

AUGUST SCHULZE, *as Pacific Pole Company, Respondent*, v. BUCKEYE LUMBER COMPANY, *Appellant*.[1]

PRINCIPAL AND AGENT—AGENCY—EVIDENCE—SUFFICIENCY. The evidence supports a finding that a bank officer acted as agent of the purchaser of timber in making an inspection, where, in response to a request for advice, he wired that he would visit the coast, investigate the matter, and report fully.

SALES—BY SAMPLE—CONDITIONS—WAIVER. Where a contract for poles did not specify the quality, but a sample was submitted and accepted, there was a waiver of any claim that the poles were to be of any different quality than the sample.

FRAUDS, STATUTE OF—SALES—WRITING—PAROL WAIVER OF STIPULATION. A stipulation as to the quality of poles sold by written contract may be waived by an oral agreement to accept poles corresponding with a sample furnished, without bringing the sale within the statute of frauds.

SALES—FOR RESALE—BREACH — MEASURE OF DAMAGES — MARKET PRICE. Upon breach of a contract for the sale of poles, which the vendor knew were purchased for resale, at Chicago, the measure of damages is the loss of profits, at the market price in that market, and the price received is some evidence of that market price.

[1]Reported in 162 Pac. 588.

SAME—BREACH—DAMAGES—WAIVER. Loss of profits on breach of a contract for the sale of poles purchased for resale, is not waived by a request to ship the poles after the time specified for delivery, where the request was made in an attempt to minimize the damages and in the hope of still effecting the resale.

Appeal from a judgment of the superior court for King county, Ronald, J., entered February 8, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Alexander & Bundy, for appellant.

Jones & Riddell and *R. C. Hazen*, for respondent.

MORRIS, J.—Action to recover damages for breach of contract for the sale and delivery of cedar poles. The appeal is taken from a judgment awarding respondent $4,000 damages, based upon a verdict in his favor.

Respondent is a dealer in poles residing at Spokane. In April, 1913, after a number of communications had passed between them, he entered into a contract with appellant, a wholesale dealer in timber products at Seattle, for the sale and delivery of 2,000 poles. This contract was made after respondent, in company with Mr. Truax, had investigated the timber from which the poles were to be cut, and had been furnished a sample showing the quality and condition of the timber. Truax was an officer of the Traders National Bank, of Spokane, and while there is some dispute between the parties as to his connection with the matter and the purpose of his inspection of the timber, we think it is evident that he accompanied the respondent as the representative of the Naugle Pole & Tie Company, with whom respondent had contracted for the resale and delivery of the poles at Chicago. This is evident, we think, from communications between Truax and the Naugle company. The first is a telegram from the Naugle company to Truax in which reference is made to the purchase of the poles from respondent,

in connection with a request from respondent for part payment upon bill of lading, ending with this inquiry:

"Would you advise our making this advancement? Please advise fully night letter."

Truax wired a night letter, and on the same day wrote the Naugle company in part as follows:

"Either Mr. Gates or the writer will leave for the coast Wednesday night to investigate the proposition and see if it is one which will be advisable for you to handle. We will report to you by wire as soon as we have a chance to make this investigation."

The night letter of same date contains this statement:

"We will investigate personally as to quality and will report fully as promptly as possible."

We think this, with other supporting evidence, is sufficient upon which to base a finding that Truax was representing the Naugle company, and that the investigation made by him was made in its behalf and for its benefit.

On June 24th, the Naugle company cancelled its contract with respondent because of its failure to make delivery, and subsequently respondent brought this action seeking to recover as damages the profits he would have made upon a resale of 2,000 poles to the Naugle company had appellant not breached its contract. The contract for delivery to respondent is admitted by appellant, as is also its knowledge that respondent purchased the poles for resale, denying only that it knew to whom the poles were to be resold or the price to be paid.

One of the questions in the case is the kind of pole called for by the contract between respondent and the Naugle company. This contract was negotiated by respondent through Gibbs, a broker residing at Chicago, who testified that he obtained a contract in April, 1913, from Mr. Benham, representing the Naugle company; that the order was a verbal one, and that to the best of his recollection nothing was said

as to whether the poles should be cut from live or dead timber. So far as we can gather from the record, the order sent by Gibbs to respondent was for 2,000 poles, giving the sizes and price without reference to any required standard. Gibbs further testified that dead poles, if otherwise good and sound, find a market in and about Chicago; that as a rule poles are supposed to be live poles, but by special agreement dead poles may be used; that, on April 14, 1913, he received a letter from the Naugle company confirming the verbal contract, in which reference is made to a compliance with the rules of the Western Red Cedar Association, which required poles to be cut from live growing timber; that, upon receipt of the sample obtained at the time of the inspection by respondent and Truax, he gave it to Benham, telling him it was a sample of the timber from which the poles would be cut; that this sample was satisfactory to Benham, who agreed to accept poles of like quality.

We think, in so far as this question is material, that, conceding respondent's contract with the Naugle company called for live poles, and that his contract with appellant did not so specify, the Naugle company agreed to accept poles of the character represented by the sample given it, and that the sample was furnished to respondent as representing the quality of pole that would be furnished. This would mean, we think, that poles of like character would be accepted by the Naugle company as conforming to its specification, and as this specification was made for its benefit, it could unquestionably accept the poles shown to it as a full compliance with the specification. We therefore have no doubt that the jury was justified in believing that, if appellant had furnished poles conforming to the sample furnished, respondent would have been able to satisfy the Naugle company contract if prompt delivery had been made. We admit that, ordinarily, the mere exhibition of a sample by the vendor does not of itself constitute a sale by sample, but that does not interfere with the other rule applicable here, that a party

to a contract may waive any specification therein made for his benefit, and may stipulate what would be a compliance with the contract.

Neither does such a stipulation, as contended by appellant, though oral, bring the case within the statute of frauds as to modification of written contracts by parol. Whatever may have been the effect of such a plea as between respondent and the Naugle company, we do not think it is available to appellant. In so far as this question enters into the measure of damages, it is clear that appellant knew respondent had resold the poles for Chicago delivery. The damages in contemplation of the parties then would be the loss to respondent if, because of appellant's failure, he failed to fulfill this Chicago contract. It would, in the absence of specific contract, be assumed, we think, that respondent would receive the market price at Chicago, and that the price as fixed in the Naugle company contract was at least some evidence of the market price. There is no question as to the unfitness of the poles shipped to Chicago by appellant. They complied with neither specification nor sample, and were for this reason rejected.

It is further contended that, because respondent, subsequent to the failure of delivery within the time specified, urged appellant to ship the poles, the breach was waived. We do not so consider it when all the correspondence, which is too long to here quote, is taken into consideration. It amounts to nothing more than an attempt on the part of respondent to minimize his damages in the hope that the Naugle company would, notwithstanding the delay, accept the poles.

Neither can we accept appellant's contention that there was no evidence of the resale of the poles to the Naugle company, nor competent proof upon which to base the damage sustained by respondent. The evidence of the profit on a resale of the poles at Chicago was indeed conflicting; but inasmuch as it was one of the facts to be determined from

competent evidence and under proper instructions, we must accept the verdict as fixing the profit.

Complaint is also made of instructions given and refused. The instructions properly submitted the case to the jury upon the respective issues made by the parties under their proof, and without setting out these claims of error in full, we rule against any claim of error based thereon.

Appellant contends it should have been granted a new trial because of newly discovered evidence and surprise. A careful examination of this claim, in the light of the showing made by both parties, convinces us there was no error in denying a new trial.

The great bulk of this record is made up of correspondence, and it is difficult to properly present all material facts within the space of an ordinary opinion. We conclude that all the issues were properly submitted to the jury, and that there is no good reason why the verdict should be disturbed.

The judgment is affirmed.

ELLIS, C. J., MOUNT, MAIN, and CHADWICK, JJ., concur.

[No. 13629. Department Two. February 2, 1917.]

EDWARD HENRY *et al.*, *Respondents*, v. NAVY YARD ROUTE, *Appellant*.[1]

APPEAL—REVIEW—HARMLESS ERROR—PLEADINGS. Error cannot be assigned upon the denial of a motion to make a complaint more definite and certain, where defendant answered over and no prejudice was shown.

PLEADING—ISSUES AND PROOF—VARIANCE. In an action for personal injuries sustained in a fall on a disembarking stairway, it is not a material variance that the complaint alleged a brass nosing on the edge of the step had been suffered to become loose, and the proof showed that it was insufficiently secured.

WITNESSES—RESPONSIVENESS—CONVERSATIONS. Where a cross-examiner asks for a conversation had at a certain time, he cannot assign error in refusing to strike an answer which was in part responsive and relevant, although not what he sought to elicit.

CARRIERS—DEFECT IN SLIPS—EVIDENCE—OTHER ACCIDENTS. In an action for personal injuries sustained by a fall upon a defective disembarking stairway, it is competent to show that prior thereto others had tripped on the same defect.

TRIAL — INSTRUCTIONS — ISSUE — GENERAL NEGLIGENCE. Under a complaint charging specific acts of negligence, a charge to the jury on the subject of negligence is not open to the objection that it was too general, when it was as specific as the evidence was required to be.

Appeal from a judgment of the superior court for Kitsap county, French, J., entered January 29, 1916, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a passenger on a boat. Affirmed.

Morris & Shipley and *Paul S. Dubuar*, for appellant.

F. W. Moore and *Charles H. Miller*, for respondents.

FULLERTON, J.—The appellant is a common carrier of passengers, operating a line of steamboats between the city of Port Orchard, in Kitsap county, and the city of Seattle,

[1]Reported in 162 Pac. 584.

in King county. On July 18, 1915, the respondent Eliza Henry became a passenger on one of the appellant's boats, and was carried from Port Orchard to the boat landing at Seattle. On the arrival of the boat at Seattle, the respondent was directed to disembark by way of a stairway in the stern of the boat, and while descending the stairway, she fell and received injuries for which this action was brought. The jury returned a verdict in favor of the respondents for the sum of $600, and from the judgment entered thereon, this appeal is prosecuted.

In their complaint the respondents alleged that the stairway was "negligently constructed, being very narrow, with insufficient number of steps for its height, and too great a pitch, without any handrail for the support of persons using the same, and was further defective in that upon the edge of the steps of the said stairway was a brass cleat, negligently constructed and placed thereon, not properly secured and which defendant had negligently allowed to become out of repair, in that, at various points, some of the brass cleats were bent upward for a space of from one-fourth of an inch to one inch, which facts were known to the defendant and its agents, or by the use of reasonable diligence could have been known to them, and which were unknown to the plaintiffs, and when about one-half the way down the said stairway, the heel of the shoe of the plaintiff Eliza Henry caught in the projecting edge of one of the said brass cleats, throwing her violently forward, and that by reason of the fact that defendant had negligently failed to provide a handrail for the said stairway, the said plaintiff was unable to prevent herself from falling when she endeavored to stay her fall, as she could have done had said handrail been provided, and she pitched heavily down about one-half the length of the said stairway," injuring "her left shoulder, back, spine, kidneys, and internal organs."

The appellant, on appearing in the action, moved that the complaint be made more definite and certain as to the nature

of the injuries received by the respondent, or, in the alternative, that a bill of particulars be furnished showing more fully such injuries. This motion the trial court refused to grant, and its refusal constitutes the first error assigned. But the appellant, after the motion had been overruled, answered over and went to trial on the merits of the action. This, under ordinary circumstances, is a waiver of the objection. It must appear, at least, that the appellant was prejudiced in presenting its defense by want of definiteness in the allegations, before it can claim error in the ruling of the court. No such condition is shown in the present record. It appears, moreover, that, during a recess in the trial, the appellant took advantage of the statute (Laws 1915, ch. 63, p. 236; Rem. Code, § 1230-1 *et seq.*) and caused the injured respondent to be examined as to the nature and extent of her injuries by three physicians and surgeons. Two of these were subsequently called by the appellant and testified fully as to the nature of the respondent's injuries. We can hardly think that the appellant's defense could have been more fully developed had the plaintiff been compelled to state the nature of her injuries with the fullness that the appellant desired. Since no prejudice resulted from the ruling of the court, the ruling, even though technically erroneous, cannot avail on an appeal.

It is next contended that there was a variance between the pleadings and the proofs as to the cause of the injury. On the motion of the appellant, the court withdrew from the jury all the allegations and proofs of negligence save that which related to the condition of the brass nosings on the edge of the steps. One of these, it was shown, had been suffered to become loose so as to permit it to rise above the carpeting on the steps, and it was on this, the respondent testified, that she caught the heel of her shoe at the time she fell. But while the allegation of the complaint is that the nosing was insufficiently secured, and the proof was that it had been

suffered to become loose, we are clear that this was proving the issue in substance. Since the substance only of the issue need be proven, it follows that, when such proof appears, there is no variance between the pleadings and proofs.

On the cross-examination of the injured respondent by the appellant's counsel, the following occurred:

"Q. And one of the employees of the ship or some gentleman other than Mr. Liter assisted in picking you up? A. No, the fellow they call Mike on the boat and some other man on the boat. Q. Are you sure this man Mike was there? A. Yes, sir. Q. And there was some conversation about when you fell at that time? A. I don't think there was. Q. Will you say there was not? A. I don't think there was any just at that time. Q. Immediately after you were picked up? A. Only when they laid me in the dining room, one of the employees with an apron on said he came near falling down three times himself that day, and that it was a very dangerous place. By Mr. Morris: I object to that and move that the answer be stricken and the jury instructed to disregard it, as not responsive to the question. Motion denied, exception allowed defendant."

The refusal of the court to strike the last answer and withdraw it from consideration of the jury is urged in this court as reversible error. Since the answer was, in part at least, responsive to the question, and the objection is to the whole of the answer, the appellant is not, strictly speaking, entitled to the benefit of its objection. *Spurlock v. Port Townsend Southern R. Co.*, 13 Wash. 29, 42 Pac. 520. But waiving this, we cannot think the refusal to grant the motion reversible error in any event. While a cross-examiner is not so far at the mercy of a designing witness that he must accept every voluntary statement made by such a witness whether or not it is relevant or responsive to his questions, yet he cannot complain if the witness anticipates him and answers concerning the matter of which he is evidently inquiring before the direct interrogation is put to him. Here the questions were utterly baseless if the conversation inquired about

was not wanted, for surely the conversation was the material matter; not whether there was or was not such a conversation at the particular time. It is not objectionable, of course, because it was not what the examiner sought to elicit, or that he may have been surprised thereby; these were chances that he took by pursuing the inquiry. Again, the answer was not incompetent nor irrelevant to the issue presented. One of the issues in the case was whether the appellant had notice of the defect prior to the time of the injury. Where such is the issue, it is competent and relevant to show that others, prior to such time, had been tripped on the same defect. *Armstrong v. Yakima Hotel Co.*, 75 Wash. 477, 135 Pac. 233.

The court, among others, gave the following instruction:

"I further charge you that if you find from the evidence that the plaintiff Eliza Henry was directed by an employee or agent of the defendant to use a stairway for the purpose of disembarking, and that the cleat or brass nosing on said steps was out of repair so that in using the same that the state of disrepair of said cleat or brass nosing was the proximate cause of the injury to the plaintiff Eliza Henry, and that she herself was without fault, then in that event you will find for the plaintiff in such sum as will reasonably and fairly compensate plaintiff for any medical expense or expense for nursing, and for any pain and suffering she has undergone in the past, or will undergo in the future as a result of the said injury alleged in plaintiff's complaint."

If we have correctly gathered the purport of the objection made to this instruction, it is that it is too general, that the complaint contained no general allegation of negligence, and that the court, therefore, should have confined the jury to the specific allegation of negligence set forth in the complaint. But, as we have said, the substance of the issue need only be proven, and clearly the substance of this issue was whether the appellant had suffered this brass nosing to become so far out of repair that it was liable to cause an injury to passengers passing over it when in the exercise of

due care. The charge of the court was as definite as the proofs were required to be, and we find nothing erroneous in it.

There was no reversible error in the record, and the judgment will stand affirmed.

MORRIS, MOUNT, PARKER, and HOLCOMB, JJ., concur.

[No. 13694. Department Two. February 2, 1917.]

THE STATE OF WASHINGTON, *on the Relation of Stephen Fletcher et al., Respondents*, v. HARRY W. CARROLL, *Comptroller, etc., Appellant.*[1]

MASTER AND SERVANT — WORKMEN'S COMPENSATION — MUNICIPAL EMPLOYEE—STATUTES—CONSTRUCTION. In view of the primary purpose of the workmen's compensation act to abolish all civil actions for personal injuries sustained in extra hazardous occupations and substitute therefor industrial insurance, the clause of the workmen's compensation act, Rem. Code, § 6604-17, which provides that so long as by state law, city charter, and municipal ordinances, provision is made for municipal employees engaged in the course of their employment, such employees shall not be entitled to the benefits of the workmen's compensation act, was not intended to allow such city employees to prosecute civil actions for damages, but rather to relegate them to the provisions made for them by the city, leaving in force the provisions of the act abolishing common law remedies.

CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—WORKMEN'S COMPENSATION ACT—ABOLITION OF CIVIL REMEDIES—POWERS OF CITY. It is not a denial of the equal protection of the laws to abolish civil actions for personal injuries sustained by city employees in the course of their employment and relegate them to provisions made for them by the city, although the different cities of the state may make different provisions, so long as the provisions made are substantial and not merely nominal; the Federal and state constitutions as to equal protection of the laws requiring only that the laws be general in their application within the territory in which they operate.

MUNICIPAL CORPORATIONS — POWERS — COMPROMISE OF INVALID CLAIMS. Where the state has abolished civil actions for personal in-

[1]Reported in 162 Pac. 593.

juries by city employees in the course of their employment and relegated them to the provisions made for them by the city, the city council has no power to compromise civil actions brought for such damages but their power is as defined and limited in the statutes and charter.

Appeal from a judgment of the superior court for King county, Jurey, J., entered August 16, 1916, in favor of the plaintiffs, in consolidated actions for writs of mandamus to compel the issuance of city warrants upon allowed claims, after a trial on the merits to the court. Reversed.

Hugh M. Caldwell, Walter F. Meier, and *J. A. Newton*, for appellant.

E. L. Skeel, W. M. Whitney, Elias A. Wright and *Sam A. Wright (J. J. Geary*, of counsel), for respondents.

FULLERTON, J.—On October 27, 1915, and for some years prior thereto, the respondents, Stephen Fletcher and Josiah E. Rhoads, were employed in the lighting department of the city of Seattle as lineman's helpers, subject to the civil service rules of the city. On the day named, the respondents were engaged, under the direction of a foreman appointed by the city to superintend the work, in stretching a wire from the city's electric supply line to the dwelling house of a resident of the city. In the prosecution of the work it was necessary to pass the wire underneath and near a supply line of the Seattle Electric Company. Through some means the wire came in contact with the electric company's line, suffering the current which the supply wire was carrying to pass through the wire while the respondents had hold of it. The result was severe burns and injuries to the respondents, the one losing a leg and the other an arm by reason thereof.

The respondents conceived that their injuries were caused because of the fault and negligence of the city and its superior agents and servants; that the city was liable in damages therefor; and severally presented claims against the city for damages, under the laws applicable in such cases, the

respondent Fletcher claiming damages in the sum of $25,000, and the respondent Rhoads claiming damages in the sum of $20,000. After the presentation of the claims to the city, the city council referred them to its finance committee. This committee, after investigation, recommended that the claimants be allowed the sum of $3,500 in full settlement; and after the respondents had signified their willingness to accept the sums on the conditions imposed, ordinances were introduced and passed directing the city comptroller to draw warrants to the claimants on the city's light fund for the respective amounts, upon their filing releases of further claims satisfactory to the legal department of the city. These ordinances were vetoed by the mayor of the city and returned to the city council with the reasons for such vetoes. The city council thereupon passed the same over the vetoes, the requisite number of councilmen required by the city charter voting therefor.

Upon demand being made on the city comptroller by the respective respondents for warrants in accordance with the ordinances, that officer, acting on the advice of the legal department of the city, refused to issue the same; whereupon proceedings in mandamus were begun in the superior court of King county by the respondents to enforce their issuance. Issues were framed which suggested the contentions of the several parties, and the proceedings consolidated and tried as one proceeding. The trial court directed the issuance of a writ of mandate, and from its judgment and order, the comptroller appeals.

Among the several affirmative defenses set forth by the city comptroller, was a defense founded upon a provision of the city charter and the workmen's compensation act. (Rem. Code, § 6604-1 *et seq.*) It was contended that these afforded the sole and only remedy against the city by a civil service employee who was injured while in the discharge of his duty, and that such remedy did not justify the payment of a lump sum to the employee, such as was attempted by the city council in the present instance. The respondents, however, con-

tended, and the trial court held, that the workmen's compensation act was not applicable to the situation; that the provision of the city charter must be considered as standing alone and without regard to the act mentioned, and that the remedy afforded by the charter was merely cumulative of the remedy afforded by a common law action in damages; further holding that, since the remedies were cumulative, the injured employee had a right of election between the two; that, having elected to pursue the remedy of an action in damages, the city council had the right to settle and compromise their claims, and that the method pursued by that body was, in substance and effect, a settlement and compromise of such claims.

The section of the city charter is found in the article thereof relating to the civil service department, and reads as follows:

"Any person in the service of the city under civil service appointment who shall be disabled in the discharge of his duties, shall receive full pay during such disability not to exceed thirty days, and half pay not to exceed six months, or who shall be permanently injured or disabled while in the line of duty, shall receive pay while such disability continues, to be fixed by the city council, not exceeding twenty per cent of the pay received by such person at the time of injury. The commission shall prescribe such rules as may be necessary for carrying out the purposes of this section, and may provide a suitable medal of honor for distinguished bravery or service while in the line of duty." Seattle Charter, art. 16, § 32.

The workmen's compensation act (Rem. Code, § 6604-1), it will be remembered, by its first section declares that the common law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions, is economically unwise and unfair, is uncertain, slow and inadequate, results in large losses to the employers with no corresponding returns to the employees, and is expensive to the state; that

it therefore withdraws all phases of the premises from private controversy, abolishes all civil actions and civil causes of action and the jurisdiction of the courts over such causes, and relegates the parties to the remedies afforded by the act. The seventeenth section makes the act applicable to a municipal corporation whenever it shall engage in any extra hazardous work in which workmen are employed for wages. The concluding clause of the section, however, provides that:

"Whenever and so long as, by state law, city charter or municipal ordinance, provision is made for municipal employees injured in the course of employment, such employees shall not be entitled to the benefits of this act and shall not be included in the pay-roll of the municipality under this act." Rem. Code, § 6604-17.

It was upon this clause that the trial court founded its conclusion that the act was not applicable to the civil service employees of the city of Seattle.

But we think this an erroneous deduction from the language used. The objects and purposes of the workmen's compensation act have been the subject of discussion by us in many of the cases brought to this court touching the various questions arising under the act, and it is not necessary that they again be stated here. It is sufficient to say that the primary of these was to do away with the common law action in damages as a remedy for personal injuries, and substitute therefor a certain and sure award applicable in all cases of injury, regardless of the question of fault and regardless of the will or desires of the parties to the immediate transaction. It may not be improper here to remark, also, that it is believed the effect of the act has been to advance the public weal. Certain it is that it has relieved the courts of the burden and the public the expense of a very unsatisfactory class of actions. No observing person will deny, much less will the judges of trial or appeal courts deny, that the trial of an action for a personal injury is often demoralizing in its effect upon the public conscience.

In no class of actions, not excepting even criminal, is unfair means, false swearing, or perjury so often rampant. This, because, perhaps, of the momentous consequences to the parties involved. On the one side, a failure to recover often means pauperism to the individual injured, the disruption of his family and suffering and want to his wife and innocent children; while a recovery, on the other hand, means the sudden loss of property which may have required years in its accumulation, and often in that other's impoverishment. Remedies which do away with these evils and mete out substantial justice to the parties involved, so far from being lightly overturned by the courts, should be upheld by them to the last extreme of their constitutional power. Having in view the declarations concerning the purposes of the act and the evils it was sought thereby to remedy, we cannot conclude that the legislature meant to subject municipalities, merely because they had themselves made provision for the care of their employees injured while in the course of their employment, to the burdens and hazards of a common law action in damages. We think it was meant, rather, to substitute the remedy afforded by the city for the remedy afforded by the act, and to leave the provisions which take away the common law action in force.

Counsel for the respondents argue, however, that to so construe the statute is to render the particular provision unconstitutional, since it is to deprive the citizen of equal privileges and equal protection of the laws. They say:

"Can it be said that there is equal protection under the law when the right to sue for negligence is abolished and the injured person in one case is given $1,500 by the state, in another case $1,000 by the city of Spokane, in another case $2,000 by the city of Tacoma, and in still another case a monthly pension by the city of Seattle? If the legislature had the power to abolish the remedy for negligence at all, it can only be by a reasonable exercise of the police power. Certainly it is not a reasonable exercise of the police power to, on the one hand, take away the common law remedy for

negligence and on the other hand delegate to a wrongdoer without restriction or limits the right to provide any compensation it deems fit."

But the law itself makes no discrimination in the respect mentioned. On the contrary, it operates alike upon all municipalities throughout the state. It simply provides that, where a municipality has itself made provision for a person injured in a hazardous occupation, the injured person must take under the municipal provision rather than under the provision made by the law itself. It is true that the result may be different recoveries in different municipalities for similar injuries, but that is not to deny to the individual the equal protection of the laws. In the absence of restrictions contained in the state constitution, the legislature may determine whether particular provisions shall extend to the whole state or be limited in their operation to particular portions of the state. All that the Federal constitution requires is that they shall be general in their application within the territory in which they operate. This statute makes no discrimination within the rule. It operates alike on all persons within the particular municipality, and no provision of the state constitution requires that it shall operate upon all in the same manner.

"The touchstone of the validity of legislation in all cases of this kind seems to be the public welfare. If the classification has a real and substantial relation thereto it is valid, otherwise it is not."

Again, equality of recovery for like or similar injuries is not obtainable under the remedies afforded by the common law. One has only to consult our own books to find that recoveries for like injuries, as discordant as those suggested by the respondents, are commonly had in the application of that remedy; and this, too, within the same municipality.

The award provided by the city charter is substantial. It is equivalent to interest at the legal rate on a much larger sum than the respondents offer to take in full satis-

faction of their injuries. It may be that were the award provided by the city merely nominal, the court would, in the interests of justice, allow the injured employee to take under the provisions of the workmen's compensation act—in other words, hold that the municipality had not made provision for the injury—but in view of the substantial nature of the award here provided, and the absence of evidence showing that the city authorities have made or indicated their intention to make merely nominal allowances, the question is not in the present record.

It is contended, also, that the city has authority to settle and compromise these claims, even conceding that the respondents must otherwise take under the provision of the city charter. But with this we cannot agree. The city's power is defined and limited by the statute and charter. It cannot substitute another remedy without an express grant of power to that effect. None is here found.

Our conclusion is that the court erred in granting the writs. The judgment and order is therefore reversed, and the cause remanded with instructions to deny them.

MORRIS, MOUNT, and PARKER, JJ., concur.

[No. 13329. Department One. February 6, 1917.]

KATHRYN M. THOMPSON, *Respondent*, v. SEATTLE PARK COMPANY, *Appellant*.[1]

COSTS—TIME FOR TAXATION—DATE OF JUDGMENT. Rem. Code, § 482, requiring a cost bill to be served and filed "within ten days after the judgment," has reference to the time when final judgment is filed with the clerk, and not to the time it is signed by the judge.

BAILMENT—FOR HIRE—NEGLIGENCE. The proprietor of a natatorium, operating a check room, is liable as a bailee for hire for failure to exercise ordinary care over valuables left with an attendant in charge of the check room.

APPEAL—REVIEW—FINDINGS. Findings of the trial judge will not be disturbed on appeal, unless the evidence preponderates against them.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered August 16, 1915, upon findings in favor of the plaintiff, in an action to recover the value of property lost through the negligence of a bailee. Affirmed.

Bronson, Robinson & Jones, for appellant.

Fred C. Brown and *M. M. Thompson*, for respondent.

FULLERTON, J.—The appellant conducts a natatorium in the city of Seattle. In connection with its business, it maintains a check room where patrons of its baths may, for a consideration, deposit their valuables for safekeeping. In June, 1914, the respondent became a patron of the natatorium by purchasing a ticket at the usual price. Prior to going into the baths, she left her rings and other valuables, inclosed in a purse, with an attendant at the check room. On her return from the baths, the purse was returned to her with all of its contents except, as she claims, a diamond ring of the value of $350.

This action is brought to recover the value of the ring. After issue joined, it was tried by the court sitting without

[1]Reported in 162 Pac. 994.

a jury, and resulted in a judgment for the respondent for the amount demanded.

The appellant first assigns as error the refusal of the trial court to strike the cost bill filed by the respondent, and to require the costs to be taxed by the clerk under rule XXI of the general rules of the superior courts. The record shows the cost bill to have been filed more than ten days after the judgment was signed, but less than ten days after it was filed with the clerk of the court. The statute (Rem. Code, § 482) provides that the cost bill shall be served on the opposite party and filed with the clerk of the court "within ten days after the judgment," and the question is whether it requires the cost bill to be served and filed within ten days after the signing of the final entry by the judge or within ten days after it is signed and filed with the clerk. The question has not been passed upon directly by this court, but questions somewhat analogous were discussed in *Quarelee v. Seattle*, 26 Wash. 226, 66 Pac. 389; *Warner v. Miner*, 41 Wash. 98, 82 Pac. 1033, and *Paich v. Northern Pac. R. Co.*, 86 Wash. 379, 150 Pac. 814.

In the case of *Warner v. Miner*, it is said that the "date of a judgment is the date of its filing." The statute in certain sections speaks of a judgment as "given," in others as "recorded," in others again as "rendered," and still in others as "entered," where the context indicates that the same meaning is intended. In the present section it will be noticed the word "judgment" is used without either of the definitive words. Since, however, "all judgments shall be entered by the clerk, subject to the direction of the court," (Rem. Code, § 435) it would seem that a judgment could not be complete, in a case where the form of the entry is signed by the judge, until it is filed with the clerk for record. In other words, the formal signing is the direction of the court to enter the judgment, which becomes such when it is received by the clerk and filed by him. Our holding is that the cost bill in this instance was served and filed within due time.

On the merits of the controversy, we have been unable to conclude that the trial court decided against the preponderance of the evidence. Conceding the law of the case to be as the appellant contends, still we think there was such evidence of insufficient care on the part of the appellant as to amount to negligence. The appellant was a bailee for hire. It was obligated to exercise ordinary care over the subject-matter of the bailment, and is liable if it failed to exercise such care. Ordinary care means such care as an ordinarily prudent person would exercise in the care of their own valuables under like circumstances, and we think the evidence justified the conclusion that the appellant did not exercise such care. At least the evidence does not preponderate against the conclusion, and this we have repeatedly said is the measure of our power to reverse the finding of the trial court.

The appellant questions the finding of the court as to the value of the ring. But both the appellant and a jeweler dealing in such articles testified in accordance with the finding of the court, and there was nothing to the contrary save a declaration asserted to have been made by the respondent, which she disputes.

Affirmed.

ELLIS, C. J., MOUNT, and CHADWICK, JJ., concur.

[No. 13608. Department One. February 6, 1917.]

HOLLAND-NORTH AMERICA MORTGAGE COMPANY, *Respondent*, v. JAMES EDWARD MASTERS *et al.*, *Appellants*.[1]

EVIDENCE—PAROL EVIDENCE TO VARY WRITING—INDEFINITENESS. A mortgage for $3,500 upon nine acres of land, requiring a house on the premises of the value of $2,500 to be insured for the benefit of the mortgagee, and providing that, on the payment of $600, any acre of land should be released, is sufficiently indefinite to admit of parol evidence that the release clause was not intended to apply to the acre upon which the house was situated.

Appeal from a judgment of the superior court for King county, Ronald, J., entered January 3, 1916, upon findings in favor of the plaintiff, in an action to foreclose a mortgage, tried to the court. Affirmed.

Charles R. Crouch (Andrew J. Balliet, of counsel), for appellants.

Ballinger, Battle, Hulbert & Shorts, for respondent.

MAIN, J.—The purpose of this action was to foreclose a real estate mortgage. The defendants appeared by answer and cross-complaint. After the issues were framed, the trial of the cause resulted in findings of fact, conclusions of law, and a judgment sustaining the right to foreclose and denying the relief sought by the cross-complaint.

The facts are these: The appellants, being the owners of a certain tract of land consisting of approximately nine acres, on June 25, 1912, made to the respondent a written application for a loan in the sum of $4,000. The application for the loan of this sum was not accepted. Further negotiations between the parties resulted in a loan of $3,500, and the giving of a mortgage upon the nine-acre tract of land as

[1]Reported in 162 Pac. 995.

security for its payment. The mortgage contains a clause which was inserted just before its signing, at the suggestion of the appellant James E. Masters. This clause provided that, on the payment of $600, any acre of land should be released by the mortgagee. Upon one acre of land covered by the mortgage there were improvements consisting of a dwelling house and other buildings which had been erected during the year 1910 at a cost of $2,500. The mortgage provided that the buildings on the premises should be insured against loss by fire, and that the insurance policy, or policies, should be made payable to the mortgagee as its interest might appear, and that the policy should be delivered to it. In accordance with this provision in the mortgage, the insurance policy was delivered. On the 28th day of August, 1914, the appellants tendered to the respondent the sum of $1,200, and demanded the release of two acres of land, upon one of which were the buildings covered by the insurance policy. This demand was refused. Subsequently, the appellants failed to make the interest payments called for by the note which the mortgage was given to secure, and the present action of foreclosure was begun.

The first question is whether, upon the tender of $1,200, the appellants had the right, under the mortgage, to have the two acres demanded by them released from the mortgage lien. The respondent claims that the release clause was not intended to apply to the acre upon which the buildings stood, and which was occupied by the appellants as a homestead. The appellants claimed that, under the release clause in the mortgage, they had an absolute right to the release of any acre of land, upon the payment of $600. The evidence shows that the purpose for which the release clause was inserted was to enable the appellants to make a sale of two acres of the land which, at the time the mortgage was executed, they had in prospect, and that the acre upon which the improvements stood was not one of those included in the contemplated

sale. The appellants contend that this evidence was inadmissible in that it tended to vary the terms of the written contract.

In construing the mortgage, all of its provisions should be taken into consideration so far as they may aid in determining the meaning of any particular clause. At the time the mortgage was executed, it obviously was not the intention of the parties that, upon the payment of $600, the mortgagee would release security to the extent of $2,100, the acre upon which the buildings stood representing $600, and the insurance policy the other $1,500. This would be the effect if, upon payment of $600, the mortgagee were required to release the acre of land upon which the improvements stood. If, however, the mortgage does not, on its face, evidence this intention, it is at least sufficiently indefinite, when considering the insurance clause in connection with the release clause, to admit of oral testimony for the purpose of explaining the reason for inserting the latter clause. The trial court found that the release clause was not intended by the parties to apply "to the acre on which were situate the improvements and homestead of the defendants, and which were covered by said insurance in the sum of fifteen hundred ($1,500) dollars as aforesaid." This finding is amply sustained by the evidence.

The second question is whether the trial court erred in declining to reform the mortgage so as to exclude therefrom one acre as demanded by the cross-complaint. Upon the acre which it is claimed was not properly included in the mortgage there had been erected what is referred to as a "beacon" pole. In the original application, this acre was not included. As already stated, the respondent declined to make the loan requested by that application, but subsequently made the loan in the amount mentioned, covering the entire nine-acre tract, which included the acre upon which the beacon pole had been erected. The trial court was of the opinion, after

hearing the evidence, that the claim that this acre had been improperly included in the mortgage had not been sustained, and with this view we are in accord.

The judgment will be affirmed.

ELLIS, C. J., MORRIS, CHADWICK, and MOUNT, JJ., concur.

[No. 13630. Department One. February 6, 1917.]

SEVERINO CAMOZZI, *Respondent*, v. PUGET SOUND TRACTION, LIGHT & POWER COMPANY, *Appellant*, C. J. ANDERSON, *as Union Messenger & Taxicab Company, Defendant*.[1]

STREET RAILROADS—COLLISION AT CROSSING — NEGLIGENCE — EVIDENCE—SUFFICIENCY—FAILURE TO RING BELL. A collision between a taxicab and a cable car is shown to be due solely to the negligence of the driver of the taxicab, where it appears that both were approaching a street intersection at about the same speed, that the cable car was in view three blocks away and stopped in the middle of the street as was customary, reaching there first, when the taxicab ran into the middle of the side of the cable car; and in such case it is immaterial that no bell was rung on the cable car.

Appeal from a judgment of the superior court for King county, Smith, J., entered March 29, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger through a collision between a taxicab and a street car. Reversed.

James B. Howe and *H. S. Elliott*, for appellant.

Vanderveer & Cummings, for respondent.

MOUNT, J.—On March 2, 1913, the respondent was riding in a taxicab which collided with a street car, in the city of Seattle, at the junction of James street and Third avenue. He brought this action to recover damages against both the street car company and the taxicab company. At the trial

[1]Reported in 162 Pac. 987.

of the case, at the close of the plaintiff's evidence, both the street car company and the taxicab company moved the court for a directed verdict, because no negligence was shown. This motion was denied. The case was submitted to the jury, which returned a verdict of five hundred dollars against each of the defendants. The street car company has appealed.

The ultimate facts are as follows: About seven o'clock, in the evening of the date stated, the respondent and his family employed the Union Messenger & Taxicab Company to take them for a ride in a Ford taxicab. They were proceeding north on Third avenue on the right-hand side of the street. It was medium dark at that time, and the street lights were burning brightly. James street intersects Third avenue at right angles. As the taxicab approached James street, the respondent testified that he saw a cable car coming down James street about three car lengths from the intersection of that street with Third avenue. The taxicab at that time was about the same distance from the crossing. The cable car reached the intersection of these streets a little ahead of the taxicab. The cable car stopped in the middle of the crossing, as was customary. The taxicab approached the street car at a speed estimated at from four to twelve miles per hour, and struck the center of the street car immediately after that car had stopped. The respondent was thrown from the taxicab and injured.

The only negligence claimed against the street car company is that the motorman on the street car did not ring the bell before approaching the crossing. The evidence is ample that the bell was rung, but, assuming that the street car bell was not rung, there is no evidence of negligence on the part of the street car company. The purpose of the bell is to attract attention of persons who are liable to be in the way of the car. The testimony of the respondent himself shows that he saw the car three car lengths before it arrived at the crossing. The ringing of the bell would have

given no additional notice. The taxicab in which he was riding was about the same distance from the crossing at that time. The driver of the taxicab, who was sitting in the front seat with the respondent, either did not see the street car or paid no attention to it. When the street car came to the crossing, it was there first, and in plain view of the driver of the taxicab. Instead of stopping the taxicab, as he should have done, he ran into the middle of the side of the street car. It requires no argument to show that the street car company, under these circumstances, was not negligent, for it is plain that the negligence was solely that of the driver of the taxicab. If he was traveling at only four miles an hour, as the testimony tends to show, or even if he was traveling at ten or twelve miles per hour, he could have stopped his taxicab readily before colliding with the street car. We think there can be no doubt that, under the facts stated, the sole negligence was that of the driver of the taxicab in which the respondent was riding. It was plainly the duty of the court to have dismissed the action against the street car company. The judgment appealed from is therefore reversed, and the cause dismissed as to the street car company.

ELLIS, C. J., MORRIS, MAIN, and CHADWICK, JJ., concur.

[No. 13637. Department One. February 6, 1917.]

NELSON & CASTRUP, *Appellants*, v. B. W. CULVER *et al.*, *Respondents*.[1]

MECHANICS' LIENS—RIGHT OF LIEN—ESTOPPEL—AUTHORIZING PAYMENT TO CONTRACTOR. A materialman is estopped to claim a mechanics' lien for the balance due on materials furnished for the erection of a house, where, upon request, he authorized the owner to pay the contractor, which the owner did, thereby altering his position to his detriment.

SAME—AGENT OF OWNER—ACTS OF CONTRACTOR. A contractor for the construction of a house who gave a worthless check to a materialman for materials furnished, is not the agent of the owner of the premises to such an extent as to make the owner responsible for the giving of the worthless check.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered April 11, 1916, upon findings in favor of the defendants, dismissing an action to foreclose a mechanics' lien, tried to the court. Affirmed.

Flick & Frater, for appellants.

Tucker & Hyland, for respondents.

MAIN, J.—The purpose of this action was to foreclose a lien for the sum of $189.85, the balance due for material used in a dwelling house erected for the defendants. The plaintiffs were copartners, doing business under the name of Nelson & Castrup. One of the defenses interposed was that of equitable estoppel. The cause was tried to the court without a jury, and resulted in a judgment dismissing the plaintiffs' action and canceling and setting aside the lien. From this judgment, the plaintiffs appeal.

On the second day of December, 1914, the respondent B. W. Culver contracted with one Victor R. Furness for the erection of a one-story frame dwelling house. During the time the contract was being performed, Furness purchased from the appellants material which was consumed in the erection

[1]Reported in 162 Pac. 978.

of the house. At about the time the building was completed by Furness, he requested the respondents to pay him the balance due on the contract. This request was refused unless Furness would secure the ratification and consent of the appellants. Thereupon, Furness went to the appellant Nelson, one of the copartners, and made, executed, and delivered to him a check for the balance due, and received a receipt acknowledging payment in full. Furness presented the receipt to the respondents, who thereupon notified Nelson, and inquired whether it was all right to pay Furness the balance due him for the erection of the house. After this conversation, the balance due upon the contract was paid to Furness. The check which Furness gave the appellants was returned by the bank upon which it was drawn, because of not sufficient funds to cover it.

The principal, and, as it seems to us, the controlling question in this case is whether the appellants are estopped to foreclose the lien. The testimony of Nelson and Culver is in conflict as to the telephone conversation in which Culver claims to have been authorized to pay the balance due upon the contract to Furness. Culver's version of this conversation, as it appears in the statement of facts, is this:

"The first thing I said 'Mr. Furness would be in to get his money and wanted to know if it was all right' and he interrupted and said 'Furness was to get the money Tuesday afternoon' and I told him he hadn't but he would be there Wednesday morning and was it all right.' He said 'All right, go ahead,' and I said, 'Do you authorize me to turn this money over;' he said 'Sure.' I says 'Who is speaking?' he says 'Nelson' and I says 'All right, I will pay him the money.'"

The trial court, who saw and heard the witnesses testify, found that Culver did inquire of Nelson whether it was all right to give Furness any balance due him, and thereupon Furness was paid such balance in the sum of three hundred dollars. The court apparently believed the testimony of Culver. After a careful examination of the record, we can-

not say that the finding is not in accordance with the preponderance of the evidence. The question then arises whether, if Nelson authorized Culver to pay Furness, after the inquiry having been directed to him in that regard, the appellants are estopped from asserting a lien. Based upon this conversation, Culver altered his position by paying the money to Furness to his material detriment, if the lien can now be established. To permit the lien to be foreclosed under such circumstances would, in effect, work a fraud upon the respondents.

The appellants claim that they did not waive their lien, and rely upon Rem. Code, § 1143, which provides that a lien created by law is not discharged by the taking of a promissory note, or other evidence of indebtedness, unless such note, or other evidence of indebtedness, is expressly received as payment, and it is so specified therein. A number of cases are also cited upon the question of the waiver of a lien, but the question in the present case is not, as we view it, whether there was a waiver of the lien by the appellants, but whether they are estopped from asserting the lien. The case of *Gull River Lumber Co. v. Keefe*, 6 Dak. 160, 41 N. W. 743, is cited as being parallel to the case now under consideration, but that case is distinguishable in at least one material particular. There, there was no express authorization by the lien claimant to the owner to pay the contractor, as here.

There is some contention by the appellants that Furness was the agent of the respondents in such a sense that his act in giving the worthless check was their act. While the contract between Culver and Furness may not have been carefully drawn in some particulars, yet it is reasonably clear that it was not the intention of the parties thereto to make Furness the agent of the respondents to the extent that the giving of a worthless check by him was their act.

The judgment will be affirmed.

ELLIS, C. J., MORRIS, CHADWICK, and HOLCOMB, JJ., concur.

[No. 13667. Department One. February 6, 1917.]

C. E. WOOLEN, *Appellant*, v. SAMUEL SLOAN, *Respondent*.[1]

FRAUDS, STATUTE OF—INTEREST IN LAND—OPTION—ORAL RESCISSION—PART PERFORMANCE. An option for the sale of real estate, required by the statute of frauds to be in writing, cannot be abrogated by a subsequent oral contract, unless accompanied by acts of part performance; hence an executory oral agreement to rescind the option and refund the option money if the property should be sold is unenforceable.

SAME. It is not a sufficient part performance of such a contract to take it out of the operation of the statute of frauds that the holder made efforts to sell the property, where the option was not exercised within the time limited, the efforts to sell were unsuccessful, a note given for the option money was paid up after the lapse of the option, and the situation of the parties was not changed to the advantage or disadvantage of either.

LANDLORD AND TENANT—RENT—IMPLIED AGREEMENT — EVIDENCE. There is no implied agreement to pay rent for a dwelling occupied by an elderly couple for a period of seven years, where it appears that $1,100 of their money was invested therein, that it was purchased for a home for them as long as they lived together, without any intention of charging them rent at the time they moved in or during the time they occupied it provided they continued to live there.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered March 22, 1916, in favor of the defendant, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Ryan & Desmond, for appellant.

E. H. Guie and *Tucker & Hyland*, for respondent.

MAIN, J.—In the complaint in this case, two causes of action are stated separately. By the first, it is sought to recover money paid for an option upon real estate; by the second, to recover rent for a dwelling house, covering a period of approximately seven years. The cause was tried to the

[1]Reported in 162 Pac. 985.

court and a jury. The verdict was in favor of the plaintiff upon both causes of action. After the verdict was returned, a motion was made for judgment notwithstanding the verdict. This motion was sustained by the trial court, and a judgment entered dismissing both causes of action. From the judgment thus entered, plaintiff appeals.

The facts, stated generally, are these: On the 29th day of April, 1902, the respondent and one Artimisia Roberts were united in marriage. At the time of this marriage, both parties thereto were well past middle life. Mrs. Sloan, at the time, had a grown son by a former marriage, who is the appellant here. At the time Mr. and Mrs. Sloan were married, the former had a tract of land consisting of about seventy-three acres, located in the Duwamish river valley, near the city of Seattle, and other property. Sometime subsequent to the marriage, Mr. Sloan conveyed to Mrs. Sloan a lot which he owned. This lot was thereafter sold by the appellant for the sum of sixteen hundred dollars, and eleven hundred dollars of this sum was invested in a property upon which there was a small dwelling house, and the title thereto taken in the name of the appellant. During the month of February, 1907, Mr. and Mrs. Sloan began to occupy the property thus purchased, and continued to occupy the same until sometime during the month of September, 1914. On the 28th day of September, 1914, the marriage of Mr. and Mrs. Sloan was annulled. On the 30th day of March, 1912, the respondent and the appellant entered into a contract in writing by which the respondent sold to the appellant an option of purchase of the seventy-three acres of land above mentioned, for the period of ninety days. For the option, the appellant agreed to pay the sum of one thousand dollars. The payment of this sum was evidenced by a promissory note of even date with the contract. The appellant permitted his option to lapse, or, as he claims, to be rescinded. On March 26, 1914, the respondent sold a portion of the seventy-

three-acre tract mentioned, and in August following, sold the remaining portion, with the exception of a few acres. The complaint in the present action was filed in the clerk's office on June 15, 1915. Other facts will be mentioned in connection with the consideration of the alleged cause of action to which they may be particularly pertinent.

The first question is whether the trial court rightly granted a judgment notwithstanding the verdict as to the cause of action based upon the option money. The appellant admits the execution of the contract and the note, as well as the payment of the note, but claims that, after the option contract was entered into and during the ninety-day period covered by the option, the parties thereto orally rescinded the contract, and that the respondent agreed that, if he subsequently sold the property, he would repay the option money, together with interest thereon. The option contract, being for real estate, of course was required by the statute of frauds to be in writing. A contract which the statute requires to be in writing cannot be abrogated or rescinded by a subsequent oral contract, unless such oral contract is accompanied by acts of part performance sufficient to remove the requirement that it shall be in writing. *Spinning v. Drake*, 4 Wash. 285, 30 Pac. 82, 31 Pac. 319; *Gerard-Fillio Co. v. McNair*, 68 Wash. 321, 123 Pac. 462; *Oregon & Washington R. Co. v. Elliott Bay Mill & Lumber Co.*, 70 Wash. 148, 126 Pac. 406; *Stoner v. Fryett*, 91 Wash. 89, 157 Pac. 213; *Thill v. Johnston*, 60 Wash. 393, 111 Pac. 225.

In the case last cited, it was said:

"Counsel for appellants invoke the general rule that a written contract may be abrogated or modified by a subsequent parol contract made between the same parties, citing, *Tingley v. Fairhaven Land Co.*, 9 Wash. 34, 36 Pac. 1098. This rule, however, does not authorize the abrogating of a contract by a new parol contract when the original contract is by law required to be in writing. Such a contract cannot be abrogated or rescinded by a parol contract, except such new parol contract is accompanied by acts of part perform-

ance sufficient to take it out of the requirement of the law that it shall be in writing."

The question here then is whether, under that rule, the evidence is such that the jury had a right to conclude that facts had been proven which showed a part performance of the alleged oral agreement to rescind, sufficient to remove the bar of the statute. Upon the question of the oral rescission, the evidence is conflicting, and where the evidence is conflicting, for the purposes of the present question, that of the appellant must be assumed to be true. Relative to the oral rescission of the written contract, the appellant testified:

"Q. What was that agreement? A. Well, if he sold the place, he was to give me the thousand dollars back. Q. What was he to do in the meantime, if anything, regarding the sale of the property, selling the property? A. Well, he was trying to sell the property. Q. What about your exclusive option to purchase it? A. We just dropped that. The option, we supposed that was dropped. . . . . Q. What do you mean by 'dropped,' Mr. Woolen? Just explain to the jury what you mean that 'you dropped that'? A. Well, he had a mortgage on his place and he wanted to sell his place and I wanted to do the best I could do for him, and so we both started in to sell the place. He was trying to sell it, and I was. Q. So it was not any longer a question of your buying it. A. No."

During the ninety-day period, the respondent, without success, negotiated for the sale or trade of the property. The appellant continued to try to sell it, but no sale was effected within the ninety days, or at all, until the time above mentioned. After the ninety-day period had expired, the appellant, from time to time, made payments upon the promissory note, given for the option, until the same was fully paid. There is no evidence that the contract was taken up and destroyed, or rescinded, other than in the manner testified to by the appellant. The return of the note was at no time demanded, and payments thereon after the ninety days, were voluntarily made. Under these facts, there is

nothing to justify the conclusion that the respondent is estopped from asserting that the alleged oral agreement is within the statute of frauds. The fact that the respondent may have attempted to sell the property worked neither an advantage to him nor a disadvantage to the appellant. Contracts which the statute required to be in writing cannot be thus lightly overturned. The evidence does not show a part performance sufficient to take the case out of the requirement of the law that such contracts shall be in writing.

The next question is whether the court erred in granting a judgment notwithstanding the verdict as to the second cause of action. In support of this cause of action, there was no evidence of an express agreement to pay rent. The question, then, is whether there was sufficient evidence to justify the inference that there was an implied agreement to pay rent. In the property for which rent was sought to be recovered, there was invested eleven hundred dollars which was received from the lot which Mr. Sloan had conveyed to Mrs. Sloan. During the seven years that the Sloans occupied the property, there had been no claim or demand for rent. The appellant testified that he did not expect to charge the Sloans any rent so long as they lived there together, and that "I bought that home for them." The first claim or demand for rent was asserted after the Sloans had separated, and Mr. Sloan had left the house in which they had been living. The appellant, at the time the Sloans moved into the property, did not intend or expect to charge them rent. During the seven years that they occupied it, he did not intend or expect to charge them rent, provided they continued to live there.

We think the evidence not sufficient to justify an inference that there was an implied agreement to pay rent.

The judgment will be affirmed.

ELLIS, C. J., HOLCOMB, CHADWICK, and MORRIS, JJ., concur.

[No. 13360. Department One. February 6, 1917.]

Horton Investment Company *et al.*, *Respondents*, v. The City of Seattle, *Appellant*.[1]

Municipal Corporations—Local Improvements—Benefits—Proceedings—Conclusiveness. Under the act of 1911, 3 Rem. & Bal. Code, § 7892-1, which confines the power to assess for a local improvement to "property specially benefited thereby" and § 7892-13, requiring the property to be assessed in accordance with the benefits conferred, the declaration in the initial ordinance that the property included in the district is all the property specially benefited, does not preclude the court from inquiring into the question of benefits to the property assessed, as a matter of fact, on appeal under Id., § 7892-22; and in determining the benefits, the court may take into consideration, with the other evidence, the fact that property outside the district was benefited.

Same — Local Improvements — Benefits — Evidence. In determining the benefits to property from filling a street, the fact that the fill will be necessary to a new sewer, not then contemplated as any part of the improvement involved, is too remote to serve as a taxable benefit to the property; as a thing which is not a benefit cannot be made the basis of an assessment for benefits.

Same—Assessments — Excessiveness — Evidence. Where forty per cent of the cost of an improvement of a street was for a fill which was of no benefit to property assessed for the full cost of the improvement, the assessment is properly reduced to sixty per cent of the cost.

Appeal—Review—Theory of Case. Upon a trial *de novo* on appeal, a correct decision will not be reversed because based upon a wrong theory.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 24, 1915, in favor of the plaintiffs, modifying an assessment on appeal from the order of the city council confirming the roll. Affirmed.

James E. Bradford and *William B. Allison*, for appellant.

Morris & Shipley and *Paul S. Dubuar*, for respondents.

Ellis, C. J.—The city of Seattle prosecutes this appeal from a judgment reducing assessments on the properties of

[1]Reported in 162 Pac. 989.

respondents for a local improvement. The improvement consists in the grading, planking, sidewalking, curbing and guttering of Ellis avenue, from Bailey street on the north to Myrtle street on the south, and the laying of sewers and water mains therein. The surface of the street, which was formerly on a level with the abutting property, was raised throughout from two to four feet. The improvement district included all the abutting, adjacent, vicinal and proximate properties between the termini of the improvement, in accordance with § 13 of the local improvement law of 1911, p. 446, 3 Rem. & Bal. Code, § 7892-13. The ordinance provided that the entire cost and expense of the improvement should be assessed against such property. It was admitted by respondents at the trial that all of the proceedings of the council and of the assessing officers in the formation of the district and in laying the assessment conformed to the formal requirements of that section. No technical objections were urged, but it was claimed, in substance, that respondents' properties were assessed much in excess of the actual special benefits conferred thereon by the improvement; that other property, not included in the district, was specially benefited much more than were the properties of respondents, and that these properties were, therefore, assessed much in excess of their proportionate share of the benefits; that Ellis avenue is an arterial highway and that its improvement was a special benefit to the city, and that all or a large part of the expense of its improvement should be assessed against the city.

Ellis avenue is located in that part of the city of Seattle known as Georgetown. It runs in a northerly and southerly direction from Bailey street on the north to Myrtle street on the south. Its junction with Bailey street is near the business center of Georgetown. There was evidence that it will eventually become a principal thoroughfare between the territory to the south and that business center, and will also give access to a business district of Seattle proper upon and

near Jackson street. For several blocks south of Bailey street, the property in the district is platted, thence south the property abutting upon both sides of the street is unplatted and is owned and used by respondent Horton Investment Company for agriculture and gardening. Prior to this improvement, the street was on a level with this property and gave every access to it that any street could give. There is at present no demand for this property for industrial purposes, but it is the intention to plat it and dispose of it for such purposes whenever the demand arises. At the trial, it was conceded that the planking of Ellis avenue and the sewers and water mains laid in this improvement are a special benefit to the properties of respondents, but it was insisted that the fill was of no benefit but was a positive detriment. The evidence shows that the fill cost forty per cent of the entire cost of the improvement. At the close of the trial, the court expressed the opinion that the property north and south of the district was specially benefited, but held that it had no authority in law to interfere with the district as defined by the council, and expressed an intention to confirm the roll. Respondents moved for a new trial, after argument of which the court filed a memorandum decision stating that it had found that the district did not include all of the property benefited, and concluded:

"I am satisfied that not more than sixty per cent of the total benefits resulting from this improvement inured to the property within the local improvement district established, and I think the assessment upon appellants' property is fully all that it is benefited. An assessment of appellants' property in a sum exceeding sixty per cent of that actually levied, plus sixty per cent of the accrued interest, is arbitrary and assessed upon a fundamentally wrong basis.

"It is not necessary to grant a new trial. I am simply constrained to modify my former holding. If the city has the power to establish an enlarged district and desires to do so, and to make a new assessment upon property benefited, I will make an order vacating the assessment roll. Otherwise I

shall modify it as to appellants' property by reducing the amount of appellants' assessment to sixty per cent of the present assessment, plus sixty per cent of the interest. The city may take its choice as to which form of judgment it prefers entered, without prejudice to take an exception to whatever form is entered."

The city electing to stand on the assessment roll, judgment was entered reducing the assessments on respondents' properties to sixty per cent of the amount shown on the rolls, plus sixty per cent of the interest, and awarding respondents their costs.

Appellant's main contention, running through its entire brief, seems to be that, because the city council, in the formation of the improvement district, admittedly conformed to the zone system as prescribed by § 13 of the law of 1911, p. 446 (3 Rem. & Bal. Code, § 7892-13), and because the initial ordinance, in pursuance of that section, declared the property included in the district the property, and all the property, to be specially benefited by the improvement, the court was bound by that declaration. Therefore, it is urged, such declaration "is a legislative act which must be regarded as a conclusive finding of fact that the property in the district is benefited to the extent of the cost of the improvement." From this postulate it is argued, in substance, that the court had no power to inquire whether other property not included in the district was in fact specially benefited, and had no power to reduce the assessments in any event. This presents a peculiar blending of the sound and the unsound. It is true, as we said in *Moore v. Spokane*, 88 Wash. 203, 152 Pac. 999:

"Since the statute authorizes the placing of the burden of the entire cost of the improvement upon the abutting property, it could not well be held that such an assessment was upon a fundamentally wrong basis, where the evidence shows that the property is not assessed for more than it is benefited."

But in that case the trial court did not find that the abutting property was assessed in a greater amount than it was

benefited, and we were of the opinion from the evidence that it was not, still we said:

"Had the evidence shown that the property was not benefited to the extent to which it was assessed, a different question would be presented, upon which no opinion is expressed."

Obviously, we did not hold that the declaration in the ordinance, though authorized by the statute, was a conclusive finding of fact that the property in the district was benefited to the extent of the cost of the improvement. In the more recent case of *Eggerth v. Spokane*, 91 Wash. 221, 157 Pac. 859, in answer to the contention that such a declaration in the initial ordinance was so conclusive as to preclude the formation of an enlarged district for reassessment or supplemental assessment, we said:

"It is further argued that, because the initial ordinance declared, as directed by the statute (§ 13), that the original district included all the property to be specially benefited, therefore there can be no enlarged district including other property. The argument is specious. The question of benefits is always a question of fact. The finding of benefits, as made in the original ordinance, was only *prima facie* and tentative. That is why the statute accords to the property owner a hearing on the question of benefits before any assessment roll is confirmed."

And in *East Hoquiam Co. v. Hoquiam*, 90 Wash. 210, 155 Pac. 754, we said:

"Taxation by special assessment is defensible only upon the theory of corresponding special benefits to the property assessed. Const., art 7, § 9."

See, also, *Seattle v. McElwain*, 75 Wash. 375, 134 Pac. 1089; *In re Leary Avenue, Seattle*, 77 Wash. 399, 138 Pac. 8; *In re Eighth Avenue Northwest*, 77 Wash. 570, 138 Pac. 10; *Viegle v. Spokane*, 78 Wash. 359, 139 Pac. 33; *In re Shilshole Avenue*, 85 Wash. 522, 148 Pac. 781.

Section 1 of the act of 1911, p. 441, 3 Rem. & Bal. Code, § 7892-1, conferring the power to pay for local improve-

ments by special assessments, confines the power to assess to "property specially benefited thereby," and § 13, which is the section relied upon by appellant, declares that the cost shall be assessed upon the property so benefited "in accordance with the special benefits conferred on such property," thus negativing the idea of any assessment beyond benefits. Again we say that no declaration of the city council, to which timely objection is taken, can preclude the trial court from inquiring into the question of benefits to the property assessed as a question of fact, nor this court from reviewing that question *de novo* on appeal. 3 Rem. & Bal. Code, § 7892-22. Though, under our decision in *Moore v. Spokane*, *supra*, the mere fact that other property than that in the district may have been specially benefited by the improvement would not alone be sufficient ground for setting aside or modifying assessments on property within the district, if such assessments did not exceed the special benefits to such property, nor include things which conferred no benefit, nevertheless that fact may be taken into consideration with the other evidence to determine whether, in fact, the property in the district was assessed beyond its special benefits, or for a thing which did not benefit it at all.

In the case here, the only claim of benefit and the only evidence of any benefit conferred upon any property by the filling of Ellis avenue was that the raising of the surface will be necessary to a new sewer system for this district and a large additional area, whenever at sometime in the future the city may determine to construct such new sewer system. But the sewer, which was put in as a part of this improvement and to pay for which a part of this assessment was levied, is an extension of the old sewer system and has an ample fall to serve the property in this district without any raise of the level of Ellis avenue. The present system, as the evidence shows, will last for fifteen years. No plan for a new system has been adopted by any action of the city

council. The supposed new system is merely a general engineering plan which it is hoped may sometime be put into effect. It seems to us that the filling of this street, which, as the evidence shows, was solely to benefit other property than that in the district, and to aid a thing not even contemplated as any part of the improvement here involved, is too remote to serve as a taxable benefit to this property. A thing which is not a benefit cannot be made the basis of an assessment for benefits. This would seem to be axiomatic. *Viegle v. Spokane, supra; In re Shilshole Avenue, supra; In re Boyer Avenue*, 79 Wash. 664, 141 Pac. 58.

The evidence here conclusively shows that the cost of this fill, which did not benefit respondents' property in any sum, was forty per cent of the cost of the entire improvement. It follows that the trial judge reached the correct result when he reduced the assessments on respondents' properties by that exact amount. It is no answer to say that the power to determine the necessity for an improvement and the character of the improvement are wholly within the discretion of the city when not controlled by statute. That is true, but it does not follow that the city can assess abutting property on the theory of benefits for a thing which demonstrably confers no benefit. If the character of the improvement was such that it would be impossible to segregate the different elements and their influence upon the property as a benefit or otherwise, or if there was no evidence from which to determine the cost of that part of the improvement which conferred no benefit, we would be unable to affirm this judgment. But such is not the case here. The evidence shows a clear segregation of the parts of the improvement which conferred a benefit and the part which did not, and also the cost of each. It is true that the trial judge did not base his conclusion upon the ground which we do, but rather upon the ground of relative benefits as between the property in the district and property outside of the district. The cause, however, is here for trial *de novo* on the evidence. Having found from the evidence

that the court reached a correct result, we cannot reverse the decision merely because it was based upon a wrong theory.

The judgment is affirmed.

MORRIS, MOUNT, FULLERTON, and CHADWICK, JJ., concur.

[No. 13619. Department One. February 6, 1917.]

M. B. HOWE, *Respondent*, v. U. H. MYERS, *Appellant*.[1]

MECHANICS' LIENS—RIGHT TO LIEN—CULTIVATING LAND. A claim for labor in cultivating an orchard is not lienable under the mechanics' lien law, Rem. Code, § 1131, which provides for a lien in favor of any person who, at the request of the owner, clears, grades, fills in, "or otherwise improves the same," as it is not of the same general class and so is within the rule of *ejusdem generis;* especially where the work was more or less intermittent extending over a period of two years, and the lien law requires the filing of a claim within ninety days from the cessation of the labor.

Appeal from a judgment of the superior court for Okanogan county, Pendergast, J., entered February 5, 1916, upon findings in favor of the plaintiff, upon sustaining a demurrer to defendant's complaint in intervention, in an action to foreclose mortgages, tried to the court. Affirmed.

Peter McPherson, for appellant.

O. R. Hopewell, A. J. O'Connor, and *S. E. Kenney*, for respondent.

WEBSTER, J.—The sole question for determination in this case is whether a claim for labor performed in cultivating and caring for an orchard, which substantially improved and enhanced the value of the land on which it was growing, is lienable under the provisions of Rem. Code, § 1131. That section is as follows:

"Any person who, at the request of the owner of any real property, his agent, contractor or subcontractor, clears,

[1]Reported in 162 Pac. 1000.

grades, fills in or otherwise improves the same, or any street or road in front of, or adjoining the same, has a lien upon such real property for the labor performed, or the materials furnished for such purposes."

If the claim asserted is lienable under this statute, it must be so by virtue of the clause "or otherwise improves the same." It cannot be said that labor performed in cultivating and caring for an orchard is of the same general character or in the same general class as labor in grading, clearing, or filling in land, and therefore, under the well known rule of *ejusdem generis*, is not within the statute. *Eastern Arkansas Hedge-Fence Co. v. Tanner*, 67 Ark. 156, 53 S. W. 886.

It is well settled that liens of this character are in derogation of the common law. They depend for their existence solely on the statutes, and the courts refuse to extend their operation for the benefit of those who do not come clearly within the terms of the statute. *Tsutakawa v. Kumamoto*, 53 Wash. 231, 101 Pac. 869, 102 Pac. 766.

It is also significant that the claim is asserted under the statute relating to liens in favor of mechanics and materialmen. If it had been the intention of the legislature to confer a right of lien for such claims, it probably would have done so in the statute relating to liens for agricultural or farm labor.

No cases have been cited, and we have been unable to find any, in which a lien for labor of the kind in question here has been sustained under a similar statute. Counsel for appellant cites the cases of *Grom v. Center*, 26 Cal. App. 198, 146 Pac. 186, and *Donehoo v. Johnson*, 113 Ala. 126, 21 South. 70. In the *Grom* case, the claim was for labor in *planting* a vineyard, and while the court refused to apply the rule of *ejusdem generis* and sustained the lien, it uses this language:

"It may be said, also, that the planting of a vineyard stands on an entirely different footing from the ordinary cultivation of the soil. It may be doubted whether for the

latter said section affords a lien, since that is probably not such improvement as the statute exacts."

The opinion refers to the case of *California Portland Cement Co. v. Wentworth Hotel Co.*, 16 Cal. App. 692, 118 Pac. 103, in which was sustained the claim of lien for furnishing and planting seeds, trees and shrubs, and in caring for the same for such a period of time as would insure that the seeds had become well started and the plants and trees were thoroughly settled in the ground. In that case, the court says:

"It is probably not true that under the terms of this section, a gardener or tiller of the soil could claim a lien by reason of labor expended in the general care of trees or crops, but under the contract made with Chisholm it appears that he was only to plant the seeds, trees, flowers, shrubs, etc., and to see that they were well started after being placed in the ground."

It is clear that, under the California cases, appellant's claim would be rejected.

The *Donehoo* case involved the construction of a permanent improvement or betterment statute, and held that the *planting* of an apple orchard, which enhanced the value of the land itself, was a permanent improvement under the statute of Alabama. The case does not consider the question of a right of lien for merely cultivating and caring for an orchard. Cases sustaining or recognizing liens for "planting a vineyard;" "planting trees, shrubs, and flowers;" "planting an apple orchard," or "breaking and reducing wild lands to cultivation," are not in point for the reason that, in all of those cases, the labor amounts to a connected and completed operation, while work in cultivating and caring for an orchard is more or less intermittent, disconnected, and seasonal. Indeed, in this case the work extended over a period of about two years. The lien statute under consideration refers to the "commencement of the performance of the labor" (Rem. Code, § 1132), and confers rights as of that time, and

provides for the filing of notice of lien within ninety days "from the date of the cessation of the performance of such labor," (Id., § 1184), which clearly indicates that the statute does not refer to intermittent or disconnected operations. To recognize liens for such labor would seriously affect the stability of real estate titles and result in endless confusion.

Affirmed.

Ellis, C. J., Morris, Main, and Chadwick, JJ., concur.

[No. 13648. Department One. February 7, 1917.]

The State of Washington, *Respondent*, v. Mike Spisak, *Appellant*.[1]

Witnesses—Impeachment—Corroboration—Inconsistent Statements. Where the accused was impeached by the testimony of the sheriff that, at the time of his arrest, he had made inconsistent statements, a basis is made for argument to the jury that his testimony was a recent fabrication; hence, on rebuttal, accused is entitled to corroborate his testimony by showing that he made other statements consistent therewith on the day of his conversation with the sheriff.

Appeal from a judgment of the superior court for Grays Harbor county, Sheeks, J., entered January 31, 1916, upon a trial and conviction of assault in the second degree. Reversed.

W. H. Abel and *A. Emerson Cross*, for appellant.

J. E. Stewart, *O. M. Nelson*, and *J. M. Phillips*, for respondent.

Morris, J.—Appeal from a conviction of assault in the second degree. The error urged is in the refusing to admit testimony offered by appellant as to a conversation had with T. H. McKay concerning the shooting charged as the assault.

The record shows this: Appellant testified that Winslow, the complaining witness, was beating his (appellant's) son;

[1]Reported in 162 Pac. 998.

that appellant three times demanded that Winslow stop, and when he refused to do so, appellant shot in order to scare Winslow. Upon cross-examination, counsel for the state laid the foundation for appellant's impeachment by asking him if he did not, at the time of his arrest, tell the sheriff a different story concerning the affair. This was denied. Anticipating the impeachment, counsel for the defense then offered to prove by appellant that, subsequent to the purported conversation which it was contended he had with the sheriff, but on the same day, appellant appeared before McKay for the purpose of obtaining a bail bond, and at that time made statements to McKay concerning the shooting substantially the same as those related by him upon the witness stand. This offer was denied. The state then produced the sheriff, who testified that appellant, at the time of his arrest, told him that Winslow was shooting at his son; that two or three shots were fired, and upon Winslow's refusal to stop shooting at appellant's command, he shot at him. Upon surrebuttal, the testimony of both appellant and McKay as to what was said to McKay was again offered and again denied.

Four cases from this jurisdiction are relied upon in support of the contention that the offered testimony was admissible. The first of these is *State v. Manville*, 8 Wash. 523, 36 Pac. 470. In that case, Manville was convicted of murder and appealed. During the progress of the trial, appellant called one Hartsock, who testified that Conboy, a witness for the state, had made a statement to him the day after the tragedy occurred concerning the manner in which the shooting was done, which statement was at variance with a material point in Conboy's testimony. The state, in rebuttal, introduced three witnesses who testified that the statement made by Conboy to Hartsock was substantially the same as the statement made by him on the witness stand. Appellant alleged error in the admission of the testimony of the three witnesses to corroborate Conboy, contending that the testimony of a witness cannot be sustained by showing that his

testimony corresponds with statements that he had previously made, citing *Ellicott v. Pearl*, 10 Pet. 412. In discussing the alleged error, the court said:

"While the general doctrine announced in that case [*Ellicott v. Pearl*], and which is, no doubt, a correct doctrine, sustains appellant's contention, the exception made to the general rule is as plainly enunciated as the rule itself, and the case at bar falls squarely within the scope of the exception instead of the rule."

The *Ellicott* case is then quoted from as follows:

" 'Where parol proof,' says Justice Story, who rendered the opinion of the court in that case, 'has been offered against the testimony of a witness under oath, in order to impeach his veracity, establishing that he has given a different account at another time, we are of opinion that, in general, evidence is not admissible, in order to confirm his testimony to prove that at other times he has given the same account as he has under oath; for it is but his mere declaration of the fact; and that is not evidence. His testimony under oath is better evidence than his confirmatory declarations not under oath; and the repetition of his assertions does not carry his credibility further, if so far, as his oath. We say in general, because there are exceptions; but they are of a peculiar nature, not applicable to the circumstances of the present case, as where the testimony is assailed as a fabrication of recent date, or a complaint recently made; for there, in order to repel such imputation, proof of the antecedent declaration of the party may be admitted.' "

This court thus approved of the general rule announced in the *Ellicott* case and the exception therein mentioned, namely, that testimony assailed as a recent fabrication may be corroborated by showing prior consistent statements. As further showing the exception was adopted, the court continues:

"The defendant in this case assailed the testimony of Conboy as a fabrication. That was the object of Hartsock's testimony, to make it appear to the jury that at first Conboy had told the truth, but that subsequently he had fabricated the statement which he made under oath."

The next case is *State v. Coates*, 22 Wash. 601, 61 Pac. 726. There the appellant, Coates, was convicted of burglary. To obtain the conviction, the prosecution relied almost entirely upon the testimony of one Kauffman, an accomplice of appellant, who detailed with particularity appellant's part in the crime with which he was charged. In contradiction of Kauffman's testimony, appellant offered the testimony of five police officers to the effect that Kauffman had been "sweated" and a confession of the burglary with which appellant was charged obtained. In this confession Kauffman said he was the only one engaged in the burglary, and in no way, at that time, implicated appellant. Upon rebuttal, the state called one Hobart to prove that Kauffman had made the same statement implicating appellant as he testified to on the trial. In passing on the admissibility of this evidence, the court said, at page 618:

"The court ruled that, inasmuch as Kauffman's statements on the trial had been impeached by showing that he had made different statements before the trial, the prosecution had the right to introduce sustaining statements made before the trial. Was this error? We think not."

The next case is *Callihan v. Washington Water Power Co.*, 27 Wash. 154, 67 Pac. 697, 91 Am. St. 829, 56 L. R. A. 772. That was an action for damages for personal injuries, and an appeal from a verdict in favor of the company. The injury was alleged to have occurred on one of defendant's cars, which was denied. Upon the trial, defendant's conductor testified that plaintiff was not a passenger. To corroborate this testimony, defendant introduced the conductor's trip report showing the number of passengers carried on the trip in question, and whether they paid by cash fare or transfer. Plaintiff contended the evidence was self-serving and inadmissible, and in passing upon the question, this court said:

"Another exception to the rule is that, if a witness be impeached by proof of his having previously made statements

that were in contradiction of evidence tending to show that the witness's account of the transaction was a fabrication of recent date, it may be shown that he gave a similar account, before its effect and operation could be foreseen. It must appear from the testimony in this case that the account given in the report would tend to show that the account given by the witness at the trial was not a fabrication of recent date."

The last case is *Conover v. Neher-Ross Co.*, 38 Wash. 172, 80 Pac. 281, 107 Am. St. 841. That was also a personal injury action. Plaintiff recovered a verdict, and defendant appealed. The court said:

"It is argued that the court permitted evidence as to self-serving declarations of respondent. Appellant had introduced evidence to the effect that respondent said, soon after the accident, that it occurred through his own fault and carelessness. In rebuttal, respondent produced two witnesses who were permitted, over objection, to testify as to statements made by respondent. The undoubted theory which appellant sought to impress upon the jury was that respondent's testimony at the trial was a recent fabrication. The testimony it had offered would naturally lead to that belief in the minds of the jury. The two witnesses, whose testimony is not criticized, testified in rebuttal as to statements made by respondent at the surgeon's office, soon after the accident. Whether the statements made under the influence of suffering, so soon after the injury, were a part of the *res gestae* is not discussed by respondent, but, if they were not, we believe the testimony came within the rule discussed in *State v. Manville*, 8 Wash. 523, 36 Pac. 470, which is to the effect that, when testimony is assailed as a fabrication of recent date, the imputation may be repelled by proof of the antecedent declarations of the party. The testimony was properly admitted."

An examination of the briefs in that case show that, as here, there was no contention disclosed in the record that the proof of prior inconsistent statements was made for the purpose of showing a recent fabrication. It also appears from the briefs that the fact that it was sought to prove a recent fabrication on the part of plaintiff was strenuously denied by defendant, who offered the evidence of prior inconsistent

statements. The following is taken from page 51 of appellant's brief:

"The counsel for plaintiff (respondent) attempted to avail himself of the case entitled *State v. Manville*, in 8 Wash. 525, on the ground that evidence had been introduced on the part of the defendant to the effect that plaintiff's narration of the facts given on the stand was of recent fabrication. We submit to this court that there is nothing in the case showing any such contention on the part of the defendant. Our contention was that the plaintiff, shortly after the accident, had acknowledged to more than half a dozen witnesses that the accident had occurred through his own fault and carelessness, and the defendant produced those witnesses upon the trial, who testified to the admissions of the plaintiff that the accident had occurred through his own fault and carelessness. No reference was made either in defendant's testimony or by defendant's counsel during the course of the trial, or in the opening statement to the jury as to when, if at all, the testimony of the plaintiff was fabricated. The 'recent fabrication' theory was the suggestion of plaintiff's counsel."

Regardless of this contention by defendant, this court said that "the undoubted theory which appellant sought to impress upon the jury was that respondent's testimony at the trial was a recent fabrication."

From these citations it is clear that this state is committed to the rule that evidence of prior consistent statements is admissible when testimony is assailed as a recent fabrication, and that it is so assailed when it is susceptible of such attack before the jury. This must be accepted, although from a close reading of the *Manville*, *Coates* and *Callihan* cases, it is evident that the conclusion reached in each case was not altogether dependent upon the "recent fabrication" rule.

The prosecuting attorney, in the instant case, strongly contends that his impeaching evidence was not offered to show a recent fabrication. The same contention was made in the *Conover* case, but this court will have to say, if its prior holdings are followed, that the introduction of this testimony of the sheriff furnished the basis of an argument to the jury

that appellant's testimony was a recent fabrication. We hold that the testimony of appellant and McKay as to the statement made by appellant to McKay was admissible, and that its exclusion was prejudicial error.

The judgment is reversed, and the cause remanded with instructions to grant a new trial.

ELLIS, C. J., PARKER, MAIN, and CHADWICK, JJ., concur.

[No. 13659. Department Two. February 7, 1917.]

GEORGE MOTTET, *Cross-Appellant*, v. M. A. STAFFORD, *Respondent*, THOMAS H. BRENTS, *Appellant*, J. J. GUMM *et al.*, *Defendants*, OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, *Garnishee Defendant*.[1]

APPEAL—TIME FOR TAKING—JURISDICTION. After the time limited for taking an appeal has expired, jurisdiction cannot be conferred by admitting timely service.

SAME—NOTICE — CROSS-APPEAL — TIME FOR TAKING. Rem. Code, § 1720, providing that parties similarly affected by an order may join in the notice of appeal within ten days after the notice is given, or serve an independent notice of appeal, does not enlarge the ninety days limited for the taking of an appeal which is an independent and adverse cross-appeal, in a proceeding in which two garnishees and an assignee of the judgment were all adversely seeking to obtain a fund in court.

GARNISHMENT—OF JUDGMENT—ASSIGNMENT — PRIORITIES. Under Rem. Code, § 664, which provides that a judgment debtor of the defendant may be garnished when the judgment has not been previously assigned on the record or by writing filed in the office of the clerk, a garnishment is superior to an assignment of the judgment which was not filed until three hours after the writ was served.

SAME—AMENDMENT OF AFFIDAVIT—EFFECT. Rights under an original writ of garnishment not served on the wife of the judgment debtor are not lost by the filing of an amended affidavit and causing a new writ to be served on the wife, since the amendment was one contemplated by Rem. Code, § 303, as not affecting rights acquired.

[1]Reported in 162 Pac. 1001.

Cross-appeals from a judgment of the superior court for Walla Walla county, Mills, J., entered March 24, 1916, in favor of the intervener, in garnishment proceedings, tried to the court. Affirmed.

Herbert C. Bryson, for plaintiff.

Thos. H. Brents, in propria persona.

M. A. Stafford, in propria persona (*Will M. Peterson* and *J. P. Neal*, on the brief), for respondent.

WEBSTER, J.—These appeals involve conflicting claims to a fund in court. The facts are not controverted and, so far as pertinent to the questions for consideration, are these: J. J. Gumm, on the 20th day of October, 1915, in an action for damages for killing live stock, recovered a verdict against the Oregon-Washington Railroad & Navigation Company for the sum of $425. On the 19th day of October, cross-appellant, Mottet, a judgment creditor of Gumm, signed and verified an affidavit in garnishment, which he retained in his possession until the verdict of the jury was received and recorded; whereupon he filed the affidavit as the basis of an application for a writ of garnishment. The writ was issued and, on the same day, was served on the railroad company. Thereafter the company answered, setting forth as its only indebtedness to Gumm the amount due on the judgment for killing the live stock. About eight a. m., on October 21, Gumm, for value and in good faith, assigned his judgment in writing to Thomas H. Brents. About one hour thereafter, M. A. Stafford commenced an action against Gumm and caused a writ of garnishment therein to be served on the railroad company. At 11:50 o'clock of the same morning and approximately three hours after the service of Stafford's writ of garnishment, Brents filed his assignment of judgment in the office of the clerk of the court. Subsequently Stafford, by leave of court, intervened in the garnishment proceeding of Mottet v. Gumm, setting up his writ of garnishment and

claiming thereunder. Thereafter Brents was made a party defendant thereto so that the rights of all parties claiming an interest in the fund might be adjudicated. Brents answered, challenging the rights of both Mottet and Stafford and claiming the entire fund by virtue of his assignment. Issues were properly framed and the cause thereafter tried, resulting in a judgment dismissing Mottet's writ of garnishment and adjudging the rights of Brents under his assignment to be subject and inferior to the garnishment lien of Stafford. Brents appeals and Mottet cross-appeals. Appellant Brents and respondent, Stafford, join in a motion to dismiss the cross-appeal, upon the ground that notice thereof was not served within the time limited by law. We will first notice this motion.

The judgment appealed from was entered on the 24th day of March, 1916. Notice of cross-appeal was served on the 23d day of June, or ninety-one days after the entry of judgment. Both Brents and Stafford admitted timely service of the notice, but it is suggested in the briefs that this was unwittingly and inadvertently done. However that may have been, "at the expiration of the time limited, the cause of action became an adjudicated matter, and no consent of the parties nor willingness of courts can recall a controversy thus wisely, by limitation of law, passed into the realm of ended suits." *Cogswell v. Hogan*, 1 Wash. 4, 23 Pac. 835. See, also, *Seattle, Lake Shore & E. R. Co. v. Simpson*, 19 Wash. 628, 54 Pac. 29. Counsel for Mottet impliedly concedes this point, but insists that, as the notice of cross-appeal was served within ten days after service of notice of the original appeal, the service was timely, and rests his contention on Rem. Code, § 1720, which provides as follows:

"All parties whose interests are similarly affected by any judgment or order appealed from may join in the notice of appeal whether it be given at the time when such judgment or order is rendered or made, or subsequently; and any such party who has not joined in the notice may at any time within ten days after the notice is given or served, serve an

independent notice of like appeal, or join in the appeal already taken . . . ."

Both Brents and Mottet were affected by the judgment, to be sure, but were they similarly affected, and are they prosecuting *like* appeals? Brents appeals from only that portion of the judgment "which concludes and declares 'that the garnishment of the said M. A. Stafford is entitled to priority over the assignment to Thomas H. Brents, and that, upon entry of judgment in favor of said M. A. Stafford against the said J. J. Gumm, the fund or indebtedness garnisheed be applied to the payment of the Stafford judgment, the remainder, if any, to be applied and paid to Thomas H. Brents upon his assignment,' instead of the whole thereof being so applied."

The question presented by this appeal is one of priority between Brents and Stafford, in which Mottet is in no way interested. That this is true is admitted by counsel for cross-appellant in the following language, on page 14 of his opening brief:

"We are not concerned with the quarrel between Judge Brents and Mr. Stafford as to their relative rights and priorities, further than to say that, if the law is followed and justice done, their efforts are both wasted as there will be nothing left for them to fight over."

The cross-appeal is from the whole judgment and is antagonistic and hostile to the interests of both Brents and Stafford. Cross-appellant did not serve an independent notice of *like* appeal, but, on the contrary, served notice of an independent and adverse cross-appeal, presenting entirely different questions from those involved in the original appeal and affecting entirely different interests.

Nor were the interests of cross-appellant and Brents similarly affected by the judgment. So far as the issue between Mottet and Brents was concerned, Brents was a party defendant, Mottet was plaintiff; Brents was a successful litigant, Mottet was a defeated litigant; and instead of their

interests being *similarly* affected by the judgment, its effect upon their respective interests was as dissimilar as success and failure.

Section 1720 quoted is a statute restricting the right of appeal by shortening the time within which notice of appeal must be served in cases to which it relates, and its purpose is to prevent appeals by piecemeal. It is not a statute enlarging the right of appeal by extending the time within which independent and adverse cross-appeals may be taken. *Griffith v. Seattle Nat. Bank Bldg. Co.*, 16 Wash. 329, 47 Pac. 749; *Beckman v. Brommer*, 57 Wash. 486, 107 Pac. 190. To adopt cross-appellant's contention would be simply to extend the time of appeal in his case from ninety days to one hundred days. The motion to dismiss must be granted.

Coming to the original appeal, the single question presented is this: Is an assignment of judgment, not made on the record nor filed in the office of the clerk of the court in which the judgment was rendered, good as against a subsequent garnishing creditor without actual notice of the assignment? Appellant relies upon the rule that a garnisher can acquire no better or greater rights to the debt garnished than his debtor had at the time of the garnishment, and cites cases in support of this well-settled principle. He then argues that, when Gumm assigned the judgment for value and in good faith, he ceased to have any interest in the judgment and, as this assignment was executed and delivered prior to the commencement of Stafford's garnishment proceeding, there was nothing upon which the writ could operate; that Gumm, having no interest in the judgment at the time of the garnishment, Stafford acquired nothing by his writ. That this contention is sound and unanswerable when applied to assignments of ordinary choses in action, and is equally sound as to assignments of judgment, in the absence of countervailing statute, must be admitted; but in this case the thing assigned was a judgment, and Rem. Code, § 664, provides:

"A sheriff or constable may be garnished for money of the defendant in his hands. So may a judgment debtor of the defendant when the judgment has not been previously assigned on the record, or by writing filed in the office of the clerk, and by him minuted as an assignment on the margin of the execution docket, . . ."

The language of the statute is plain and unambiguous and leaves nothing to interpretation. In effect it is a recording statute, and the words "on the record" mean what they say. The evident purpose of the statute was to protect garnishing creditors who in good faith rely on the record and act upon the information thus afforded, and to prevent fraud and perjury by closing the door against antedating assignments of judgment for the purpose of defeating the rights of such creditors.

Appellant cites 2 Freeman on Judgments (4th ed.), § 422:

"With respect to its assignable qualities, a judgment is governed by the rules applicable to other choses in action; and may be assigned by any person and by any method competent and sufficient for the assignment of any other chose in action. . . . If a statutory mode of assigning judgments is provided, this does not operate as an inhibition against all other modes of assignment. It is cumulative, and does not prevent a party from making an equitable assignment in any other lawful way; and such assignment, as to all persons having notice thereof, is as effective as the statutory assignment."

This is unquestionably a correct statement of sound law, and we do not wish to be understood as holding that, where a statute provides a mode of assigning judgments, the mode so prescribed is exclusive, in the absence of express declaration to that effect, and prevents a party from making an equitable assignment in any other lawful way. We simply hold that, where the statute provides how notice of the assignment shall be given in order to affect the rights of third persons, the provisions of the statute are controlling.

The case of *Bellingham Bay Boom Co. v. Brisbois*, 14 Wash. 173, 44 Pac. 153, 46 Pac. 238, is cited and earnestly

relied upon as sustaining the contention that an assignment of judgment is good against a garnishing creditor even though it be not made or filed in the manner provided by § 664, *supra*. But a careful reading of that case discloses that the court was considering an assignment of an ordinary chose in action. The instrument under which appellants in that case were claiming was an assignment of an account for money advanced and labor performed, made during the pendency of an action to enforce its collection, but before the rendition of judgment. The writ of garnishment also was sued out and served prior to the rendition of judgment. Therefore the question of assigning judgments was not, and could not have been, before the court. That the court was considering an assignment of a chose in action merely is shown by the following language, on page 177, of the opinion:

"We think an assignment of a chose in action in good faith and for value, and with no intent to hinder, delay or defraud creditors or subsequent purchasers, is complete and effectual as against third persons, upon its execution and delivery to the assignee, and does not acquire any additional force or validity by notice to the debtor."

Again, at page 181, the court says:

"But it [the legislature] has not yet said that no assignment of a chose in action shall be valid as to creditors or innocent purchasers unless recorded or notice thereof be otherwise given to such persons; and, in the absence of such a declaration, we do not think we ought to depart from what we deem the better doctrine, on account of any supposed analogy between ordinary bills of sale and assignments of choses in action."

The latter paragraph clearly implies that, if the legislature had said that no assignment of a chose in action shall be valid as against creditors and innocent purchasers unless recorded in a prescribed manner, the provisions of the statute would have controlled; and this is precisely what the legislature has said, so far as garnishing creditors are concerned, when the thing assigned is a judgment.

It is suggested that Stafford, by filing an amended affidavit and causing a writ of garnishment to be served on the wife of Gumm, lost his rights under the original writ. The suggestion is without merit. The amendment was one contemplated by § 303 of Rem. Code, and did not disturb or affect the rights acquired under the original writ.

The judgment will be affirmed.

MORRIS, MOUNT, PARKER, and FULLERTON, JJ., concur.

[No. 13784. Department One. February 7, 1917.]

THE COUNTY OF YAKIMA, *Respondent*, v. OLAF OLSON *et al.*, *Appellants*.[1]

EMINENT DOMAIN—COMPENSATION—RIGHT OF WAY—MEASURE OF DAMAGES. In proceedings to condemn a right of way for a drainage ditch, in which the damages were assessed after the work had been constructed, the measure of damages is the value of the property taken, together with all damages to the remainder, whether traceable to proper or negligent construction, regardless of the location of the property, from which is to be deducted the special benefits to the remaining property.

SAME—DAMAGES—EVIDENCE — ADMISSIBILITY. In proceedings to assess the damages for the condemnation of a right of way for a drainage ditch, evidence as to the maintenance of a railway fill that affects only a third party should be excluded as confusing the issue.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered April 18, 1916, upon the verdict of a jury awarding damages in condemnation proceedings. Reversed.

Parker & Holden, for appellants.

William B. Bridgeman, for respondent.

CHADWICK, J.—Appellants are the owners of certain lands and a building equipped as a cannery in the town of Granger.

[1]Reported in 162 Pac. 987.

To drain some 7,800 acres lying to the north and east of this property, enlarged drainage district No. 2 was organized under chapter 176, Laws of 1913, p. 611 (Rem. Code, § 4226-1 *et seq.*). The area to be drained included the town of Granger and outlying districts.

The main ditch, which was constructed before this action was begun, was approximately 50 feet wide and 12 feet deep. It crossed appellants' property. Prior to the construction of the new system of drainage, the territory was drained by what was called the "old ditch," which was a natural gully and of much smaller capacity. Below and abutting appellants' property, the tracks of the Oregon-Washington Railway & Navigation Company crossed the line of the ditch. A culvert, with a capacity of 350 second feet, was designed to carry the waters of the ditch through the fill under the railroad track.

In the spring of 1916, the district was flooded and the culvert through the Oregon-Washington Railway & Navigation Company's fill proved inadequate to carry the drainage water. The fill formed a dam and, as a result, appellants' property was flooded until the fill gave way and allowed the excess water to escape. Subsequent to this flood, and after the completion of the enlarged drainage system, an order of necessity was entered and a jury impaneled to ascertain appellants' compensation and damages for the appropriation of the right of way across their property.

Gross damages in the sum of $600, less benefits to the extent of $150, were awarded. A judgment for $450 and a decree of appropriation were entered.

We find merit in only two of the many assignments of error.

On the question of determining the gross damages to appellants' property, the trial judge instructed as follows:

"Second: The determination of the amount, if any, the present cash market value of the part of respondent's said

land not taken has been decreased by said drainage district acquiring the right to maintain and operate a so-called new ditch over said strip of land in its present condition on the said strip, and also by the right to maintain and operate as a part of said ditch the so-called pipe, if any outside said strip, provided you shall be convinced that the maintenance and operation of said pipe as the sole means of carrying the water over the space it covers is, in view of the surrounding conditions, negligence by the drainage district in the sense I shall hereinafter define such negligence; but unless you shall be so convinced, you will not consider the decrease, if any, in the value of the part not taken caused by the right of the drainage district to maintain such pipe, if any, for said purposes outside said strip, because respondents cannot legally complain of the pipe's operation outside their own land unless it was negligently done or planned. Said decrease in value, if any, so ascertained by you I shall hereafter refer to as the decrease in value of the property not taken by the appropriation of said strip to ditch purposes."

This instruction eliminates all question of damage to appellants' remaining property resulting from the construction and operation of that part of the drainage ditch which does not abut appellants' lands, unless there was negligence. The trial judge apparently had in mind two kinds of damage which may result from proper construction by the condemner: First, damage traceable to some part of the condemner's project in direct physical contact with the property affected; and second, damage resulting from "the pipe's operation outside their [appellants'] lands." The latter element was proscribed.

We do not understand this to be the law. Where, as in the case at bar, damages are assessed after the works have been constructed, we think the proper measure of gross damages is the value of the part taken, together with all damages to the remainder, whether traceable to proper or negligent construction, and regardless of the location of that part of the condemner's property which is alleged to have been the proximate cause of the damage. From the gross damage, when so

determined, should be deducted the special benefits to the remainder. Lewis, Eminent Domain (3d ed.), §§ 691-821.

This court considered the question of the proximity of the source of damage in *Wendel v. Spokane County*, 27 Wash. 121, 67 Pac. 576, 91 Am. St. 825. In laying out a county road, the dam of a lake was cut, permitting the waters to flood the adjoining country.

"Respondent says that this damage, if any was caused, was caused over seven miles from the roadbed. It makes no difference whether the damages were sustained seven miles or seven feet from the roadbed. It might be a little more difficult to prove that the action of the county at that distance was the proximate cause of the injury, but that is a question which will be submitted to the discretion of the jury. The contention of the respondent that the county cannot be held responsible for injuries occurring off or beyond the roadbed resulting from the building of the road cannot be sustained by either reason or authority. . . .

"It is insisted that there is no allegation of carelessness or negligence in the complaint. No such allegation is necessary. If the allegations of the complaint are true, it is the taking of private property for public use without compensation, and falls within the prohibition of the constitution (art. 1, § 16) so often construed by this court. And it makes no difference whether it was done *negligently* or *carefully*. The taking is what the constitution prohibits. *Brown v. Seattle*, 5 Wash. 35 (31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161); *State ex rel. Smith v. Superior Court of King County*, 26 Wash. 278 (66 Pac. 385)."

Error is also assigned in the admission of a stipulation to the effect that the fill of the Oregon-Washington Railway & Navigation Company would not be replaced by the Drainage District. The maintenance of the fill would seem to be a matter for the railway company, and the admission of this stipulation would only confuse the issues.

Reversed and remanded with instructions to grant a new trial.

ELLIS, C. J., MORRIS, MAIN, and WEBSTER, JJ., concur.

[No. 13750. *En Banc.* February 8, 1917.]

In re SHILSHOLE AVENUE.

BOLCOM MILLS, INCORPORATED, *et al.*, *Respondents*, v. THE CITY OF SEATTLE, *Appellant*.[1]

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—ASSESSMENTS—APPEAL—PROCEEDINGS—FINDINGS. Upon appeal from an assessment for benefits for a local improvement under the act of 1911 (3 Rem. & Bal. Code, § 7892-22), providing for trial without a jury and that the court shall confirm, correct, modify or annul the assessment, the appeal vests the court with plenary jurisdiction of the whole question of special benefits, to be tried upon evidence, and findings of fact are not only appropriate but necessary unless waived.

SAME—LOCAL IMPROVEMENTS — ASSESSMENTS — REVIEW—LEGISLATIVE AND JUDICIAL QUESTIONS. Under 3 Rem. & Bal. Code, § 7892-13, which provides that the property within a local improvement district shall be considered and held to be all the property specially benefited and shall be assessed to pay the cost, or such part thereof as may be chargeable against the property benefited, the legislative determination by a city council of public necessity has no bearing upon the question of special benefits, which is a judicial question, under Const., art. 7, § 9, vesting the corporate authorities with the power to make local improvements by special assessment or taxation, and under the statute, Id., §§ 7892-21, 7892-22, providing for a judicial review of the question of benefits.

SAME. The only questions to be reviewed under such statutes are the questions of direct or special benefits and the amount thereof on the property included within the district; and property not benefited cannot be assessed, nor can property be assessed for more than it is benefited.

SAME—PROCEEDINGS—JUDGMENT—PARTIES BOUND. Where a city has been consolidated with another, the latter succeeds to the rights and obligations of the former, as fixed by an award and judgment in condemnation proceedings for a local improvement.

SAME — PROCEEDINGS — BENEFITS — JUDGMENT — RES ADJUDICATA. Where, in proceedings to condemn the right to damage streets by flooding up to a certain level, in which two elements of damage were involved: first, injury to the streets themselves and the cost of restoring them to public use so as to be above the potential water level, and second, the injury to abutters from the raising of the level of the streets above the abutting property, and the city has

[1]Reported in 162 Pac. 1010.

been paid the award for the damage to the streets, it is under obligation to restore them to public use, and cannot levy special assessments for the same improvement again; at least not without crediting the amount received and showing any necessary additional cost not awarded and collected; and where this was not done, the proceeding and judgment in a former assessment is *res adjudicata* of the question involved and decided therein, and is a bar to any further assessment for raising the level of the street.

ELLIS, C. J., MORRIS, and MAIN, JJ., dissent.

Appeal from a judgment of the superior court for King county, French, J., entered February 29, 1916, upon findings in favor of the plaintiffs, on appeal from the decision of the city council confirming an assessment for a public improvement, tried to the court. Affirmed.

Hugh M. Caldwell and *Howard A. Hanson*, for appellant.

Donworth & Todd, *Higgins & Hughes*, *J. P. Wall*, and *W. W. Wilshire*, for respondents.

HOLCOMB, J.—In this matter about sixty individuals and companies, upon whose property the assessment involved had been laid by the city under an ordinance No. 30,389, for the special benefits by the physical filling and other improvements of Shilshole avenue and other streets, avenues and approaches thereto, appealed to the superior court from the action of the city council in confirming the special assessments against their lands. As to these property owners, who are the respondents here, the judgment of the superior court either reduced in amount or wholly canceled the assessments that had been confirmed against their respective properties. The property owners all acquiesced in the judgment of the superior court, although that judgment confirmed the assessments against many lots which were the subject of contest in the court below and merely reduced many other assessments which the property owners contend should have been wholly canceled.

The proceeding is under the local improvement statute of 1911, Laws 1911, p. 441, now embodied in 3 Rem. & Bal.

Code, §§ 7892-1 to 7892-72. In a former case, *In re Shilshole Avenue*, 85 Wash. 522, 148 Pac. 781, involving an assessment roll made in eminent domain proceedings by the eminent domain commissioners of the city of Seattle to pay the damages resulting from the raising of the grade of Shilshole avenue and the incidental change of the grades of other streets and avenues and approaches thereto, will be found a succinct statement of most of the conditions and situations existing in this proceeding as shown by the record, and an announcement of the law as to certain questions involved therein and which seem to be involved in this appeal. The entire record in that case, including the decision and remittitur from this court, were introduced in this case. The trial judge who tried the former proceeding also tried this, and in determining the matters involved in this case, deemed that he was following the law of the case as settled by the decision in the former case as to the question of special benefits involved by this improvement.

Ninety-five errors are assigned by appellant in this case, but they are reducible to two principal questions, which are urged by the appellant in argument. They are these: (1) The effect in this case of the findings of fact in the condemnation assessment hearing which was involved in the former appeal; (2) the legal status created between Seattle and the lot owners by the King county canal judgment on verdicts.

It is first vigorously contended that the determination of necessity for and the character of the improvements is a legislative function to be, and which was, determined by the legislative authority of the city. In this respect the city contends that the physical grading of these streets and approaches was determined as a matter of necessity by the city, and that it was determined to have been necessary to grade the streets and approaches to certain heights above flooding for the purpose of sewering the property involved, and that the sewering of the abutting property required

filling to such elevations. This theory the lower court rejected. The city also contends that it acquired the right to make such fills by an eminent domain proceeding under ordinance No. 29,834, pursuant to the act of 1907, Laws 1907, pp. 321, 325, §§ 15, 23, as amended by the act of 1909, chapters 210 and 211, Laws 1909, pp. 723, 724 (Rem. & Bal. Code, §§ 7782, 7790). That was the proceeding which was involved in the former appeal. In that case an assessment roll was prepared by the eminent domain commission, assessing the property assumed to be specially benefited to defray the costs of the improvement. Upon that hearing, certain findings were made, conclusions of law entered, and the assessment roll was set aside and the matter referred to the commission with instructions to prepare a new roll. Cross-appeals were taken. The city took no exceptions to the findings of the trial court. The judgment was reversed with instructions to cancel the assessments. See *In re Shilshole Avenue, supra.* A petition for rehearing, setting forth, among other points, that an order setting aside an assessment roll and directing the preparation of a new roll was not a final order and that this court had no jurisdiction thereof, was denied. Following this, the lower court entered an order canceling all eminent domain assessments and barring the city from levying any eminent domain assessments against any property involved in the first appeal. In this proceeding, the trial court held that the findings, judgment and remittitur of this court, which were admitted in evidence, were *res adjudicata* as to the parties and the issues involved therein; and the city is certainly one of the parties involved therein. Much of the reasoning in that case might with profit be reiterated here as decisive of much of this controversy.

His Honor ruled throughout that the determination of the city council that the improvement was necessary was binding upon the court and all parties, so far as concerned any attempt to stop the improvement or to interfere with the perfect freedom of the city to make or not to make it. In de-

termining the further question, viz., whether the abutting property was benefited by the improvement, he held that this was a question of fact to be determined by the court from the evidence and giving due weight and consideration to the presumptions raised by the acts of the city. The statutes referred to, relating to such local improvements, provide for an assessment roll, and require the city council to sit as a board of equalization for the purpose of considering such roll, and to correct and revise it and to confirm it by ordinance. In case objections were filed by any property owners, the council is required to consider and pass upon such objections. Section 22 of that act of 1911 (Laws 1911, p. 453, § 22; 3 Rem. & Bal. Code, § 7892-22) provides that the decision of the council or other legislative body, upon any objections made within the time and in the manner prescribed by the act, may be reviewed by the superior court upon appeal taken thereto. A trial of the matter by the court without a jury is provided. It is also provided that the judgment of the superior court shall confirm, correct, modify, or annul the assessment, in so far as the same affects the property of the appellant. It makes no provision for referring the matter back to the city council. It seems that the appeal vests the superior court with plenary jurisdiction of the whole question of special benefits.

The city seemed to contend, and seems to contend here, that the fact that the city has the legal right to determine at what grade it shall improve the streets deprives the court of power to consider the question of special benefits on the trial of the statutory appeal. The trial court proceeded upon the theory that, in determining the question of benefits, he must be governed by the evidence as to the character of the abutting property claimed to be specially benefited, having due regard to existing circumstances and requirements and those reasonably to be anticipated. He did not question the finality of the city council's decision of the necessity of the improvement, but when the city claimed that that deter-

mination was conclusive evidence of the benefits to the particular property involved, and that the particular grade established by the city was necessary for the use and development of the abutting property, he refused to be bound by the legislative declaration of the necessity for the improvement as a *determination of the benefits to accrue to the abutting property.* In other words, he tried the case upon the theory that the statutory appeal provided by the law required him to examine into the facts as to the benefits to accrue to the property involved and determine the matter accordingly, and upon this theory he disposed of the case.

In so disposing of the case, appellant claims that he "fixed a judicial grade," substituting it for the legislative grade established by the city authorities. What the trial court did, in substance, was to hold that the city had the undoubted right to raise the grade of streets to any height that it desired within reason, but an abutting property owner would not be specially benefited by elevating the streets any more than to place them in a dry and usable condition above the height to which the water would be raised by the construction of the Lake Washington canal, following the finding sustained in *In re Shilshole Avenue, supra.* In doing so he grouped the properties according to the conditions shown to exist, and as to the streets which had before been graded, he canceled the assessments; as to streets which were before ungraded, he directed that computations and estimates be made of the cost of filling to elevations of nine and five-tenths feet above city datum, to which height the city had acquired the right to flood on account of the necessities of the Lake Washington canal; as to streets which were above the elevation of nine and five-tenths feet, he allowed, as a special benefit, the cost of merely surfacing such streets, and in both of the last mentioned instances the cost of placing thereon and therein such walks, gutters and other municipal improvements as the city had provided for in this proceeding. He then distributed this cost upon the abutting property as

local assessments are spread, and reduced the assessments levied by the city to such sums, which he then confirmed against the lots. The grades which had been established by the city for the streets, avenues and approaches were to an elevation of sixteen to eighteen feet above city datum. The court held, as a matter of law and of fact, that these grades were excessive grades, so far as the property owners were concerned, and did not confer any special benefits upon the abutting property. It is apparent that what the trial court attempted, at least, was to ascertain and determine from the evidence lines of demarcation between what were special benefits to the property affected and what were not, under the circumstances and situations of the various properties at the time.

The trial court made and entered very comprehensive findings of fact upon the evidence, resolving the evidence, where it was in conflict, in favor of the property owner in some instances and in favor of the city in others, to a greater or less degree, apparently keeping in view at all times in determining such questions the pronouncement by this court particularly in the former appealed cases. The findings of the trial court are amply supported by evidence, and whether findings are necessary at all in such a case, they are appropriate, and in this case constitute a valuable epitome of the great mass of evidence introduced. This being a statutory or law proceeding triable without a jury, we may say that findings are not only appropriate but necessary, unless waived.

Upon the question of the public use and public necessity, the many former holdings of this court are cited, on the initial question of the right to maintain eminent domain proceedings to acquire or to damage private property for public use, where we have held to the principle that, in original eminent domain proceedings, the determination of the question of public necessity by municipalities is conclusive upon the courts in the absence of fraud. This rule has been laid down

in many cases, all of which were collected and referred to in *Tacoma v. Titlow*, 53 Wash. 217, 101 Pac. 827, and afterwards referred to in *Tacoma v. Brown*, 69 Wash. 538, 125 Pac. 940, and adhered to in *Maggs v. Seattle*, 74 Wash. 323, 133 Pac. 388; *Spokane v. Merriam*, 80 Wash. 222, 141 Pac. 358, and *In re Appeal of North Yakima*, 87 Wash. 279, 151 Pac. 795. None of these cases hold or intimate that, in a proceeding to assess the benefits directly upon the property affected by the public improvement under the local improvement statutes, the legislative determination of necessity has any bearing upon the question of benefits or forecloses judicial inquiry upon that subject. On the contrary, the statute and the constitutional provision which supports the statute, providing that, "The legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessment, or by special taxation of property benefited" (Const., art. 7, § 9), clearly make the question of the direct or special benefits a judicial one and protect the citizen against an assessment in excess of the benefit. Dillon, Municipal Corporations (5th ed.), § 1439. The statute provides for a judicial review of the question of the benefits to the property affected. If the court had no other function than to confirm or register the decree of the city council as to what property was benefited and to what extent, there is no review, and the provision for removing the matter to the superior court for review is an empty formality. While the trial might be permitted and a mass of evidence introduced, it would be totally unavailing because the benefits would have been determined in advance by the city council and would necessarily be confirmed, which could be done without a trial or review. As we said in the former *Shilshole Avenue* case, at page 537:

"It is the basic principle and the very life of the doctrine of special assessments that there can be no special assessment to pay for a thing which has conferred no special benefit upon the property assessed. To assess property for a thing

which did not benefit it would be *pro tanto* the taking of private property for a public use without compensation, hence unconstitutional."

And in former cases, such as *In re Leary Avenue*, 77 Wash. 399, 138 Pac. 8, and *In re Fifth Avenue and Fifth Avenue South*, 66 Wash. 327, 119 Pac. 852, it was positively announced as "the duty of the court to inquire whether the property is assessed more or less than it is specially benefited."

Section 7892-13 of the statute under which these proceedings are maintained provides:

"All property included within said limits of such local improvement district shall be considered and held to be the property and to be all the property specially benefited by such local improvement, and shall be the property to be assessed and pay the cost and expense thereof *or such part thereof as may be chargeable against the property specially benefited by such improvement*, . . ."

Thus, the statute negatives any attempt to settle the question of special benefits as a legislative one.

In this proceeding all the public improvements were included within one local improvement district, and the appellant asserts that, because the right to take or damage part of the properties was acquired under different condemnation proceedings, the question of the assessment of benefits was determined to the extent of the properties affected in those condemnation suits and could not afterwards be reviewed in any proceeding. That situation does not present any other or different question. The benefits here assessed are assessed within one public improvement district. The statutes under which the city proceeded, referring more particularly to § 7892-21, provide for an equalization by the city council, with authority to correct, revise, raise, lower, change or modify the roll as shall be just and equitable, and the following, § 7892-22, then provides that:

"The decision of the council or other legislative body upon any objections made . . . may be reviewed by the su-

perior court upon an appeal thereto . . . The judgment of the court shall confirm, correct, modify, or annul the assessment in so far as the same affects the property of the appellant."

This hearing in the superior court is, therefore, a trial before the judge without a jury, a statutory proceeding, and is a real and necessary trial on evidence. The only questions to be reviewed by the superior court on such an appeal are the question of direct or special benefits and the amount thereof on the property included within the improvement district, as to which objections were made and an appeal taken by the objectors to that court. Upon determining those matters, it is the duty of the court to confirm, modify, correct or annul the assessment in so far as the same affects the property of the appellant. Property not benefited cannot be assessed. *In re Elliott Avenue*, 74 Wash. 184, 133 Pac. 8; *Spokane v. Gilbert*, 61 Wash. 361, 112 Pac. 380; *Spokane v. Fonnell*, 75 Wash. 417, 135 Pac. 211; *Aumiller v. North Yakima*, 73 Wash. 96, 131 Pac. 470. Nor can the property be assessed *for more* than it is benefited. *In re Eighth Avenue Northwest*, 77 Wash. 570, 138 Pac. 10; *State ex rel. Murphy v. Wright*, 76 Wash. 383, 136 Pac. 482; *Murphy v. Summersett*, 84 Wash. 565, 147 Pac. 199; *Viegle v. Spokane*, 78 Wash. 359, 139 Pac. 33; *In re Leary Avenue, Seattle*, 77 Wash. 399, 138 Pac. 8; *Spokane v. Kraft*, 82 Wash. 238, 144 Pac. 286; *East Hoquiam Co. v. Hoquiam*, 90 Wash. 210, 155 Pac. 754; *In re Shilshole Avenue, supra; Reynolds v. Cosmopolis*, 84 Wash. 660, 147 Pac. 407.

In the last mentioned case, it was stated that the respondent property owner "had an adequate remedy under the statute, which gives the right to file objections to the assessment roll, and an appeal therefrom. If the respondent has rights which are being invaded by the amount of the proposed assessment upon her property, they can be fully and adequately protected by means of the appeal provided by the statute." So, also, in *Seattle Mattress & Upholstery Co.*

v. Seattle, 69 Wash. 666, 125 Pac. 1013, it was stated that the question there to be determined was one of special benefits to be determined on the evidence. In the *Leary Avenue* case, where the court, upon an appeal by the property owners, reduced the assessment fifty per cent in an eminent domain proceeding, we said that we were unable to say that the court did not arrive at a correct decision upon that question. In *In re Fifth Avenue and Fifth Avenue South*, *supra*, we said that the amount to be assessed against property within the district and proper to be assessed was an appropriate subject of judicial inquiry, and, following a long line of cases, the judgment of the court would not be disturbed or modified unless the evidence so preponderates against the judgment as to indicate an arbitrary disposition on the part of the commissioners or the court. In *Murphy v. Summersett*, *supra*, it was said:

"The real issue is the amount of benefits resulting to several lots and tracts of Summersett *et al.* Upon this issue they were not foreclosed, nor were they foreclosed upon any question of fact relevant to this issue."

In *Ankeny v. Spokane*, 92 Wash. 549, 159 Pac. 806, it was declared:

"All of the authorities agree that a local improvement to be chargeable upon private property as such must possess at least two essential elements; (1) the improvement must be of a public nature, as contradistinguished from one purely private, . . . and (2) it must confer a special benefit on the property sought to be specially charged with its creation and maintenance, over and above that conferred generally upon property within the municipality."

Without multiplying authorities further, it is clear that the trial court proceeded upon the right theory, notwithstanding the contentions of appellant that there are facts and circumstances in this case distinguishing it from any of the cases herein cited. In the assessments disturbed by the court, the city had proceeded upon fundamentally wrong bases. As has been repeatedly declared, the ultimate ques-

tion to be determined is, what property was specially benefited by the improvement created by the city, and to what extent was it benefited. This the court determined upon evidence, and the evidence seems to justify his determination. The trial court, in fact, very carefully followed and applied the principles declared in the former case of *In re Shilshole Avenue, supra.*

The second proposition raised by appellant involved the introduction in evidence and the consideration of the verdict and judgment awarded to the city of Ballard in the former King county canal condemnation case. That case is also referred to in the former *Shilshole Avenue* case, *supra,* at page 524. It is there stated that:

"In that proceeding, the property owners received compensation for the flooding of their property, and the city of Ballard for the flooding of the streets. The amount allowed to the city was $7,500, which the city accepted and devoted to municipal uses. Subsequently, and some years prior to the proceedings here involved, the city of Ballard was annexed to the city of Seattle, which city succeeded to all of the property rights and obligations of the city of Ballard."

Two conclusions of law of the trial court are set out in full in the former opinion at pages 529 and 530, which more fully explain this matter.

At the time of the condemnation for the Lake Washington canal, the property of the city of Ballard, which was then a separate municipality, was condemned and the right acquired to damage the same by flooding up to a certain elevation. The city of Ballard, as that record shows, in its answer, claimed the cost of restoring the streets, and obtained the verdict and judgment which was shown by the evidence as the jury's award therefor. It may have been a very inadequate award, but it was the total award and, regardless of the amount thereof, was a judicial determination of the cost of restoration of the streets to a dry and usable condition up to a certain elevation, and was a final judgment

rendered by a court of competent jurisdiction. Afterwards, when the city of Ballard became a part of the city of Seattle, certainly the city of Seattle, as successor in interest of everything the city of Ballard had ever had, became possessed of all the city of Ballard's rights, including the award which had been made it and which had gone into its general fund and assets, and also succeeded to its rights or obligations to restore its streets which had been affected by those judicial proceedings. The proceedings and judgment in the case were, therefore, material and competent and were *res adjudicata* of the questions involved therein.

In that case, King county acquired the right to damage or injuriously affect the streets then in Ballard, now in Seattle and largely included within the present local improvement district, by flowage. The streets still retained their status as public highways, and the municipality still retained the right to restore them for street purposes above flood level. There was no perpetual destruction of access condemned and acquired, but only the injury to access resulting from the fact that the streets, when restored, would be at a higher level. There were, therefore, two elements of damage involved in that condemnation; first, the injury to the streets themselves and the cost of restoring them to public use so as to be above the potential water level; and second, the injury to abutters resulting from the fact that the streets when restored would have to be restored considerably above their old level. Unquestionably the municipality, rather than the abutting property owners, after having received its award for the damage to its streets, was under the obligation of restoring them or rendering them accessible after the flooding thereof; and the abutting property owners could not, and did not, receive any portion of that element of damage, that is, the award for restoring the streets to accessibility. *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1106; *In re Harrison Street*, 74 Wash. 187, 133 Pac. 8; *Hinckley v. Seattle*, 74 Wash. 101, 132 Pac. 855, Ann. Cas. 1915A 580,

46 L. R. A. (N. S.) 727. If the city has been paid once for the improvement, it cannot levy special assessments for the same improvement and be paid again. McQuillin, Municipal Corporations, § 2026, note.

The city now seeks to claim that the Ballard verdict affected only isolated portions of the streets. It was found in the former *Shilshole Avenue* case that the entire raise of grade throughout the Shilshole avenue district was caused by the canal raise, and the evidence in the present case demonstrates the same fact. Ballard, presumably, was awarded and collected all such street damage.

In the former *Shilshole Avenue* case, at pages 532, 533, it was said:

"The main contention of the appellant property owners is that the city having received compensation for the flooding of these streets in the old county condemnation suit, cannot assess the resulting damages for raising the grade of the streets against the abutting property. The city contends that, in contemplation of law, the property owners received pay in the old county condemnation for every damage to their property caused by the actual flooding of the property itself or the adjacent streets, and that the city only received compensation for the injury to its own interest, that is, the public easement in the streets; that both the property and the streets, immediately upon that condemnation, became potentially flooded to the depth of seven feet above datum, but that the grades, either actual or official, of the streets were not changed either physically or potentially. There is much force in the view that the potential condition which was then created, though surely necessitating some kind of an improvement by a change of grade, did not alter the legal relation either of the city or the abutting property to the streets or to each other in their relation to any future improvement of the streets, since the property owners had already received pay for the damage to their street access. We shall not, however, decide this question, since the view we take of the case in other particulars renders its decision unnecessary."

It will be seen, therefore, that the decision in the former case, while noting the conclusion of the trial court as to the

effect of the verdict in favor of the city of Ballard in the original condemnation proceeding, did not attempt to decide it, but decided that proceeding upon the other question, as stated on page 534 of the decision, that "the damages awarded in the condemnation proceeding were occasioned by that portion of the change of grade from a point slightly above the level of the water . . . to the present grades as established herein. That is to say, from about nine feet above city datum to about sixteen feet above city datum," and that "the added height above the level necessary to raise the streets slightly above water conferred no benefits upon the submerged property."

Although this question was passed in the former case as having no bearing in that proceeding, nevertheless it is material in this proceeding to assess special benefits for the physical improvement, under local improvement statutes, for the reason that it is conclusive as to damage being allowed to the former city of Ballard, now merged in the city of Seattle, for the submerged streets, avenues, and approaches involved in this local improvement district. It seems just in principle that the city, having already been paid for the improvement by the parties obligated under the law to bear its cost, cannot levy a special assessment upon the private property abutting, and collect payment for the improvement of restoring the streets to a dry and usable condition a second time, without at least first crediting the amount received and showing any necessary additional cost not awarded and collected, which it did not do or attempt.

We feel, therefore, that there was no error in the admission of the Ballard verdict and judgment based thereon, nor in the trial court's conception of the proper legal effect thereof.

Other minor questions are urged by appellant, which are either included in the two principal propositions determined or which we find of no substantial merit. On the whole rec-

ord, the judgment of the trial court is substantially right.

Affirmed.

MOUNT, PARKER, FULLERTON, and CHADWICK, JJ., concur.

MORRIS, J. (dissenting)—In the proceedings below, the trial court permitted inquiry into questions from which it sought to determine the reasons for the "necessity" of this improvement, going so far as to inquire into the character of the sewers to be built, both main and lateral; whether or not the grades proposed by the city were proper, or whether those proposed by respondents should be substituted; whether or not the city was justified in making provision for underground utilities, such as water and gas mains and conduits for electric wires; whether or not it would be sufficient, to meet the requirements of the improvement district, for the city to make a reduced fill rather than to adopt the elevations established in the condemnation ordinance. I have always understood, and still believe, that these are legislative and not judicial questions. The majority point to no authority which satisfies my mind that heretofore in so determining we have been in error. If it were profitable to prolong this dissent, many reasons might be suggested why this prerogative of common councils, in matters of this kind, should not be usurped by the courts. The error, to my mind, is so apparent it needs no reasoning to point it out. I therefore dissent.

MAIN, J. (dissenting)—I concur in the dissent written by Judge Morris.

ELLIS, C. J. (dissenting)—I concur in what Judge Morris has said. Moreover, it seems to me that the finding touching benefits in the condemnation proceedings has no bearing on the question of benefits resulting from the physical improvement.

[No. 13340. Department One. February 9, 1917.]

THE STATE OF WASHINGTON, *on the Relation of Alfred H. Lundin, Respondent*, v. JESSE J. HUMPHREY *et al., Appellants.*[1]

PROSTITUTION—NUISANCES—ABATEMENT — ACTIONS — DEFENSES—TEMPORARY CESSATION. Under the "Red Light" law, Rem. Code, § 946-2, which provides for an action of abatement, "whenever a nuisance exists," and Id., § 946-8, authorizing a fine against any owner of a building used for prohibited purposes whenever a permanent injunction issues in such action, it is not a defense to the action that the property was not being used for the purposes of prostitution at the time the action of abatement was commenced nor since, where it appears that the owners knew it was being so used and made no effort to abate the nuisance after arrests had been made, nor until after the commencement of the abatement action; a temporary cessation of unlawful practices not being sufficient where it is presumable that they would have been continued but for the abatement action.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered August 11, 1915, in favor of the plaintiff, in an action to abate a nuisance, tried to the court. Affirmed.

Peterson & Macbride, for appellants.

Alfred H. Lundin and *Frank P. Helsell*, for respondent.

PER CURIAM.—This is a proceeding to abate as a nuisance the conducting of a house of prostitution in the city of Seattle, and to enforce against the property the penalties prescribed by the statute. The property in question is owned by the appellant Kristine Humphrey. It was leased to a Japanese sometime in the year 1913 as a lodging house, who conducted it as such until the early part of the year 1914, when, with the consent and approval of the appellants, he assigned the lease and turned possession of the property to one Mabel Roberts. Later on, Mabel Roberts, again with

[1]Reported in 162 Pac. 983.

the consent and approval of the appellants, reassigned the lease and delivered possession of the property to one Evelyn Reede. After the assignment by the Japanese, the house was conducted by the women named as a house of prostitution. In July and December, 1914, and again on January 16, 1915, the lessees and certain inmates of the building were arrested and fined under the criminal statutes for engaging in prostitution. After the final arrest in January, 1915, the inmates of the house abandoned it; Evelyn Reede, who then owned the furniture, selling it to one Joseph Haten for a stated consideration of $500.

This action was instituted on January 27, 1915, some eleven days after the final arrest. Between the dates of the arrests, the house was in charge of two elderly people who had taken up their residence in the house some time prior to January 16, 1915, and remained therein after that time at the request of Haten. Later on, the appellants repossessed themselves of the premises and again let it to a Japanese. Since the arrest in January, 1915, there is no showing in the record that the house was conducted as a house of prostitution. The appellants testified that it had not been so conducted, and testified, also, that they had no knowledge, prior to the time of the last arrest, that it had ever been so conducted. It appeared, however, that they resided at all times in a dwelling house situated within ninety feet of the building, and that it was common knowledge in the neighborhood that it was being so conducted, frequent complaints to that effect being made to the police. It appeared also that the appellant Jesse J. Humphrey collected the rents for the building monthly during the time it was occupied by the women named, going to the house for that purpose.

The trial court entered a decree granting a permanent injunction abating the nuisance, ordered the furniture in the building to be removed and sold, and assessed against the building and the grounds upon which it is situated and against the owners of the property a tax of $300. This ap-

peal raises the question whether the tax is legally assessed.

By § 946-2 of Remington's Code, it is provided:

"Whenever a nuisance exists, as defined in this act, the prosecuting attorney or any citizen of the county may maintain an action in equity in the name of the State of Washington upon the relation of such prosecuting attorney or citizen, to perpetually enjoin said nuisance, . . ."

By § 946-8, it is provided:

"Whenever a permanent injunction issues against any person for maintaining a nuisance as herein defined, or against any owner or agent of the building kept or used for the purposes prohibited by this act, there shall be assessed against said building and the ground upon which the same is located and against the person or persons maintaining said nuisance, and the owner or agent of said premises, a tax of three hundred dollars. . . ."

The trial court found from the evidence—and we think the finding justified—that the appellants knew of the use to which the lessees had put the premises long before the last arrest of the lessees in January, 1915. The evidence justifies the conclusion, also, that the appellants themselves made no effort to abate the nuisance or to put the premises to legitimate uses until after the commencement of the present action. But since the evidence fails to show that the premises were occupied by prostitutes or that acts of prostitution were practiced thereon subsequent to January 16, 1915, the appellants contend that the tax levied against the premises was unjustified. Attention is called to the fact that the language of the first section quoted is in the present tense—that the action may be begun "whenever a nuisance exists"—and it is argued that, since the nuisance ceased at the time of the last arrest, no nuisance existed at the time the action was begun some days later, and hence the action will not lie. But we think this contention not justified. The appellants themselves made no effort to abate the nuisance until after the commencement of the abatement action. The cause for abatement was the activity of the police officers. The appellants'

activity commenced on the commencement of the abatement action. Having shown a disposition to allow the law to be avoided, it is presumable that they would have continued to do so but for the abatement action. A temporary cessation from the unlawful practices is not enough. The state has the right to resort to all the remedies afforded to make the cessation perpetual. Since, therefore, the action was necessary to arouse the owners to activity, we think the court was justified in imposing the penalties the remedy afforded. Affirmed.

[No. 13585. Department One. February 9, 1917.]

WARD JESSEPH, *Respondent*, v. ANNA WESTERBERG, *Appellant*, IDA EDWALL, *Respondent*.[1]

WILLS—SPECIFIC LEGACY—DATE OF BEGINNING. A will directing payment to a niece of the sum of $30 each and every month during the life of the testator's wife, payable out of the net revenues of the estate, creates a specific legacy during the lifetime of the wife, and not an annuity; and hence commences immediately upon the death of the testator.

SAME—SPECIFIC LEGACY—FROM NET INCOME—DEFICIENCIES. Should the right to claim such a legacy be postponed until there is a net revenue or until the same can be determined upon final settlement, the sums payable, with all deficiencies, are to be paid at any time when there are any net revenues available.

SAME—SPECIFIC AND RESIDUARY LEGACY—TIME FOR PAYMENT. In such a case, a further direction to pay out of the net revenues the balance and residue of said net returns to the testator's wife, once each year during her natural life, simply makes the wife a residuary legatee of the net revenues, and is not a direction for yearly accounts to the first legatee who was to be paid each month.

SAME—SPECIFIC LEGACY—DEFERRED PAYMENTS—INTEREST. Under a will directing the payment of a legacy of $30 each and every month during the lifetime of the testator's wife, out of the net revenues of the estate, deferred payments during the time in which there were no net revenues do not draw interest until there is a fund in hand.

[1]Reported in 162 Pac. 1004.

APPEAL—REVIEW—HARMLESS ERROR. Error in admitting evidence of the intention of the testator, in an action for the construction of a will, is harmless on trial *de novo* on appeal.

Appeal from a judgment of the superior court for Lincoln county, Sessions, J., entered February 25, 1916, upon findings in favor of a legatee, in an action by a trustee for the construction of a will, tried to the court. Reversed.

J. D. McCallum, for appellant.

Hurn & Hurn, for respondent Edwall.

M. E. Jesseph, for respondent Ward Jesseph.

CHADWICK, J.—Peter Edwall died testate on the 12th day of January, 1912, leaving an estate situate in Spokane and Lincoln counties. Respondent Ward Jesseph was nominated as executor of the estate, and as trustee of the distributive interest of the decedent after final settlement. The estate was closed on March 13, 1914. The community interest of the widow, Ida Edwall, was distributed to her, and the community interest of the deceased was distributed to the respondent as trustee.

The will directs:

"My said executor to pay to Miss Anna Westerberg, of Edwall, Washington, my niece, the sum of thirty ($30) dollars each and every month during the life of my wife, Ida Edwall, out of the net revenues of my said net estate, and the balance and residue of said net revenues of my said estate, I direct my executor to pay to my wife, Ida Edwall, of Spokane, Washington, once each year during the period of her natural life."

"Fifth, After the expiration of the natural life of my wife, Ida Edwall, I direct that my entire estate, of whatsoever kind, nature and description and wherever situated, be distributed by my said executor as follows: First, to Miss Anna Westerberg, of Edwall, Washington, my niece, the sum of fifteen thousand & 00/100 dollars, ($15,000) and the balance and residue of my said estate to be divided equally among the following named persons, to wit: My brothers, Andrew Edwall and C. W. Edwall, both of Galva, Illinois, my sister,

Kate Westerberg of Edwall, Wash., and my niece, Miss Anna Westerberg, of Edwall, Wash."

Appellant, Anna Westerberg, contends that the will speaks from the testator's death, and demands $30 per month for each and every month since the testator's death, with interest on deferred payments at the legal rate. Respondent Ida Edwall asserts the meaning of the will to be that there shall be an accounting at the termination of each twelve months from and after the date of final settlement of the estate, and that it is the duty of the trustee to settle his accounts in March of each year for the preceding year and, after charging the expenses of maintaining the estate for that year, to pay appellant the sum of $30 per month for each month of that particular year; that if, at the end of the year, there be not sufficient funds in the hands of the trustee to pay the full amount which would be due appellant for that year, that is to say, $360, she must bear the loss; that her "annuity" would abate in proportion to the deficiency in the annual revenues, and if there be an excess of revenues over the sum which would go to appellant as her "annuity" it should be paid to her, Ida Edwall, under the terms of the will, irrespective of any deficiency in the amount due Anna Westerberg for previous years. For two years the estate did not earn a net revenue. In 1915, the trustee, after paying charges and expenses, had funds on hand.

Meeting with the respective contentions of the two beneficiaries under the will, and being unable to determine the right of their demands, the trustee brought this action, setting up all the facts, and praying a construction of the will and that he be directed in the discharge of his duty.

The court found:

"The said Anna Westerberg has claimed and demanded from plaintiff $30 per month for each and every month since the date of testator's death, with interest on deferred payments at the legal rate, to be paid out of the accumulated and accumulating profits of said estate; that the defendant

Ida Edwall asserts that said payment of $30 per month to Anna Westerberg, under said will, is only due and payable out of the net revenues of said estate, and that at the end of each year after the discharge of plaintiff as executor, it is the duty of plaintiff to balance the accounts of said trust and pay to defendant Westerberg $30 per month, and the balance of said profits to Ida Edwall, and that defendant Westerberg is not entitled to payments of $30 per month except said estate earns net profits during the year preceding such balance."

The intent of the testator to give to Anna Westerberg $30 for each and every month following his demise seems evident from the language employed. If the testator had intended to create an annuity to be paid out of the net annual revenues, that is, to pay Anna Westerberg $360 as an annuity, and the balance of the income of the estate to Ida Edwall, he would have employed apt language. It would require no art of expression to disclose his will, if such it were. Instead, he made a specific legacy, or what is called in some of the books, an "allowance of income." It is not an annuity, but a monthly stipend resting in the life of Ida Edwall.

The first question to be decided is whether the legacy dates from the death of the testator or from the time the estate was settled. A specific legacy to be paid currently must have a time of beginning. In this case, the testator saved all question, and has avoided that confusion which has led to frequent litigation. He has fixed a term certain. Ida Edwall was living when Peter Edwall died. The legacy, being made to rest in the life of Ida Edwall, attached immediately upon the death of the testator and continues from month to month for the life of Ida Edwall, the only limitation (we are not called upon to decide whether the legacy might be a charge upon the corpus of the estate) being that the sums are to be so paid out of the net revenues of the estate. It seems to us that this conclusion is demonstrable from the wording of the will, and is further sustained by the unusual provision fixing

the term of the legacy in the life of a third person. But, if it were otherwise, the rule is that such legacies—whether called specific or demonstrative, or allowances of income in the nature of annuities—date from the death of the testator, unless a contrary intent is made clearly to appear. 2 Jarman, Wills (6th ed.), p. 1144; *Houghton v. Franklin*, 1 Eng. Ch. 390; 2 Schouler, Wills, Executors and Administrators (5th ed.), § 1479; 2 Woerner, American Law of Administration (2d ed.), § 454.

This is well established, although the right to claim the legacy or "annuity," if it may be so called, may be postponed until after the estate has been closed and the rights of creditors barred, or until there be a net revenue out of which accumulated delinquencies can be paid. Such postponement (under the English law, which is followed in many American cases, the time for settlement is theoretically recognized as one year) is only for convenience. If "there were no debts, the court would give the fund to the party, notwithstanding there had not been a lapse of twelve months." *Garthshore v. Chalie*, 10 Vesey Jr. 1, 13; *Gibson v. Bott*, 7 Vesey Jr. 98, note; 2 Woerner, American Law of Administration (2d ed.), § 454.

The next question submitted by counsel is whether Anna Westerberg can claim, out of the revenues of the current year, an amount equal to that which she would have received in the years following the death of the testator when the estate yielded no income. What we have already said, and the authorities cited, sustain her right to do so. The words $30 "each and every month . . . out of the net revenues of my said net estate" cannot, from the very nature of things, be held to mean that the net revenue shall be determined each and every month, and the legacy be paid if there is a net balance on hand. Nor can it mean that the net revenues shall be calculated once every year, for it is well known that the net revenue of farm lands cannot ordinarily be so calculated. The phrase means, rather, that the amount to be paid shall

be paid, with all deficiencies, at the rate of $30 for each prior month, at any time there are net revenues available for that purpose.

"The will does not give the annuities out of each year's specific income, as was urged by the counsel claiming the surplus. They are given out of the whole interest and income of the estate; and the residuary legatees are to have nothing until after the payment of all the annuities. There would be no surplus income to divide, according to the terms of the will, until the annuities were paid. . . . In *Farmer v. Mills* (4 Russell, 86), the Master of the Rolls gave his opinion, that where there was a direction to pay annuities out of investments, and residuary bequests were then given, and the estate fell short; the arrears of annuities were to be made up on some of the annuitants dying, before the residuary legatees would be entitled." *Stewart v. Chambers*, 2 Sandf. Ch. (N. Y.) 382, 393.

In *In re Chauncey*, 119 N. Y. 77, 23 N. E. 448, 7 L. R. A. 361, a case very like the one at bar, there was a bequest of an annuity to an adopted son from the income of the estate. The balance of the income was to be paid to the husband. For some years there was not enough income to pay the annuity to the son. Later there was a surplus. It was held that the deficiency arising in former years should be made good from such surplus. The next of kin contended that a surplus could not be so employed, but should be distributed as a property undisposed of by the will. The court said:

"The contention of the next of kin would lead to the establishment by the trustees of a financial year which should be inflexible, and whenever the year terminated should require them to close the books and begin a new and independent term for the receipt of income. In such event the lapse of a year without the receipt of income would cause the loss of the annuity to the devisee, no matter how productive the fund might prove for succeeding years. This result must be worked out by reference to the intention of the testatrix, if sustainable at all, but we have heard no reasons drawn from the provisions of the will which support such a theory. . . .

"We are of the opinion that in case there had been a surplus of income in any year after full payment of preceding annuities, it would have been competent for the trustees to have paid it over for distribution among the next of kin, as a fund would thereby have been created which was not disposed of by the will; but that no such distribution could properly be made while any part of such annuities remained unpaid."

It was also held, upon a similar state of facts, in *Cochrane v. Walker*, 4 Dem. (N. Y.) 164, that an annuitant is entitled to have any certain excess of arrearages of lean years satisfied from the income of future years that are full.

We find in the will no language to sustain the theory that the right of appellant to participate is subject to an annual account, and if there be $360, or any part thereof, that the trustee shall pay it over in full settlement of the monthly allowance, or if there be no income or a lesser sum than $360, that the legacy abates, either wholly or *pro tanto*. To so hold would be to destroy the evident intent of the testator to make monthly provision for his legatee, and substitute therefor a legacy in the nature of an annuity with possible diminution. It is not the province of the court to make a will or to revise, according to its own notions, the act of one who has solemnly declared his purpose in the form of a last will and testament. As we have said, the clear intent of the will before us is that appellant shall have $30 for each and every month Ida Edwall lives. No time is fixed for calculating the net revenues of the estate, in so far as Anna Westerberg is concerned, and in obedience to the law, which in all cases undertakes to do the will of the testator, she is entitled to receive all payments, either present or deferred, whenever there is a surplus on hand out of which her legacy can be paid. If, at the end of any year, after the payment to her of all that is her due, any surplus remains, it is to be paid to the residuary legatee, Ida Edwall. If it were not so, the law would defeat not only the testator's intention, but Anna Westerberg's right to claim for a part, or possibly all, of the months "during the life" of Ida Edwall.

The court has given too much weight to the words "pay to . . . Ida Edwall . . . once each year," and too little to the words "pay to Miss Anna Westerberg, . . . the sum of thirty ($30) dollars each and every month . . ." He has made their claims to the estate equal in a sense, when the testator intended that the specific legacy or allowance should be first paid and discharged before Ida Edwall has any right to participate in the income of the estate. She is a residuary legatee. The provision for the payment of $30 each and every month to Anna Westerberg, and the payment of the balance of the net revenues to Ida Edwall, can be construed without doing violence one to the other. They mean no more than that Anna Westerberg shall be entitled to $30 for each month, and that once each year the trustee shall have an account and settlement and pay to Ida Edwall whatever might be remaining in his hands at that time.

The authorities relied upon by counsel for respondent are based upon the assumption that there is some language in the will from which an intention can be inferred that the legacy is to be paid out of the surplus from year to year, and not from the net revenues of the estate without limitation as to time. They provide for the distribution of annual income, a part to one and the balance to another. They use the words "annual income" and "payments each and every year," and like expressions. The theory of respondents is well set forth and sustained in the case of *Comstock v. Comstock*, 78 Conn. 606, 63 Atl. 449. Our holding is really sustained by the *Comstock* case. The only distinction between that case and *Stewart v. Chambers*, *supra*, is pointed out as follows:

"In the following cases it was held that the annuities for each year were charged upon the income for that year and not upon the income generally, and yet in none of them was the language of the will as unmistakably indicative of that intent as the language here. *Appeal of Brewster*, 12 Atl. Rep. (Pa.) 470; *Estate of Pierce*, 56 Wis. 560; *Casamajor v. Pearson*, 8 Cl. & Fin. 69. In New York the right to re-

the consent and approval of the appellants, reassigned the lease and delivered possession of the property to one Evelyn Reede. After the assignment by the Japanese, the house was conducted by the women named as a house of prostitution. In July and December, 1914, and again on January 16, 1915, the lessees and certain inmates of the building were arrested and fined under the criminal statutes for engaging in prostitution. After the final arrest in January, 1915, the inmates of the house abandoned it; Evelyn Reede, who then owned the furniture, selling it to one Joseph Haten for a stated consideration of $500.

This action was instituted on January 27, 1915, some eleven days after the final arrest. Between the dates of the arrests, the house was in charge of two elderly people who had taken up their residence in the house some time prior to January 16, 1915, and remained therein after that time at the request of Haten. Later on, the appellants repossessed themselves of the premises and again let it to a Japanese. Since the arrest in January, 1915, there is no showing in the record that the house was conducted as a house of prostitution. The appellants testified that it had not been so conducted, and testified, also, that they had no knowledge, prior to the time of the last arrest, that it had ever been so conducted. It appeared, however, that they resided at all times in a dwelling house situated within ninety feet of the building, and that it was common knowledge in the neighborhood that it was being so conducted, frequent complaints to that effect being made to the police. It appeared also that the appellant Jesse J. Humphrey collected the rents for the building monthly during the time it was occupied by the women named, going to the house for that purpose.

The trial court entered a decree granting a permanent injunction abating the nuisance, ordered the furniture in the building to be removed and sold, and assessed against the building and the grounds upon which it is situated and against the owners of the property a tax of $300. This ap-

peal raises the question whether the tax is legally assessed.

By § 946-2 of Remington's Code, it is provided:

"Whenever a nuisance exists, as defined in this act, the prosecuting attorney or any citizen of the county may maintain an action in equity in the name of the State of Washington upon the relation of such prosecuting attorney or citizen, to perpetually enjoin said nuisance, . . ."

By § 946-8, it is provided:

"Whenever a permanent injunction issues against any person for maintaining a nuisance as herein defined, or against any owner or agent of the building kept or used for the purposes prohibited by this act, there shall be assessed against said building and the ground upon which the same is located and against the person or persons maintaining said nuisance, and the owner or agent of said premises, a tax of three hundred dollars. . . ."

The trial court found from the evidence—and we think the finding justified—that the appellants knew of the use to which the lessees had put the premises long before the last arrest of the lessees in January, 1915. The evidence justifies the conclusion, also, that the appellants themselves made no effort to abate the nuisance or to put the premises to legitimate uses until after the commencement of the present action. But since the evidence fails to show that the premises were occupied by prostitutes or that acts of prostitution were practiced thereon subsequent to January 16, 1915, the appellants contend that the tax levied against the premises was unjustified. Attention is called to the fact that the language of the first section quoted is in the present tense—that the action may be begun "whenever a nuisance exists"—and it is argued that, since the nuisance ceased at the time of the last arrest, no nuisance existed at the time the action was begun some days later, and hence the action will not lie. But we think this contention not justified. The appellants themselves made no effort to abate the nuisance until after the commencement of the abatement action. The cause for abatement was the activity of the police officers. The appellants'

corporations intended to issue in the pursuit of their schemes to acquire lands and water rights and to develop an irrigation system at the expense of those with whom they hoped to deal.

Appellants Koppen were induced to take the joint bonds of the said companies to the face value of $16,000 in payment for their lands. The appellants did not discover the fraudulent purposes of the companies until in January, 1912, in which month they were adjudged to be bankrupt by the United States district court sitting in Seattle, Washington. They thereafter brought this suit, claiming to be defrauded vendors, and asking that their deed be set aside and held for naught. In the meantime the companies had contracted with respondent J. H. Fox for the construction of ditches, canals, laterals, and other material parts of the irrigation system which they had planned. Fox performed labor to the value of more than $50,000, of which $38,470 was unpaid. Being unable to collect the amount due him, he filed a lien upon the property of the companies, including the property conveyed by appellants Koppen to them, and thereafter began an action to foreclose his lien and to satisfy his demands by sale of the property. He alleged the insolvency of the companies, and asked for the appointment of a receiver. In consideration of the dismissal of his action, and an extension of time, the companies paid $5,500 in cash and gave three several notes for $8,000, due September 1st, October 1st, and November 1st, 1911, respectively, and a note for $8,948.86, due December 15, 1911. Payments were made as follows: September 11, 1911, $500; November 30, 1911, $500; and January 4th, 1912, $2,000. The notes were secured by a mortgage upon the lands sold by appellants, and other lands.

The court found that the extension of the time of payment of the balance due upon his lien claim, as evidenced by the notes and mortgage hereinbefore described, was a sufficient and valuable consideration for the dismissal by respondent Fox of his suit brought for the foreclosure of his lien and for the appointment of a receiver for the debtor companies.

This, and the conclusion of law drawn from it, is assigned as error, the gist of appellants' contention being that the mortgage given to respondent J. H. Fox was made when the corporations were hopelessly insolvent, and to hinder, delay, and defraud the creditors of the corporations, including appellants, and to give to respondent Fox an unlawful preference over the other creditors of the corporations, including appellants.

Pending the trial, and after the answer of Fox had been served, appellants amended their complaint, claiming to be creditors of at least equal standing with Fox, and claiming that Fox had been given an unlawful preference.

The case is presented from several angles. Many questions are raised. Authorities are cited and freely discussed. But we think it unnecessary to follow the discursive arguments of counsel beyond one question, resting in the maxim: "Equity regards substance rather than form." "Equity will in no case permit the veil of form to hide the true effect or intent of the transaction." Fetter, Equity, p. 23.

The validity of the lien filed by Fox is not attacked in any way, nor is it claimed that, if he had pursued his remedy, his lien would not have been first in right as it was in time. The controlling question is, therefore, whether a court of equity—which will not, in the absence of a statute, suffer a wrong to be without a remedy—will deny him his advantage because he changed the form of his lien from that of a statutory lien for work and labor done and materials furnished, into a mortgage to secure notes given to cover the amount of his demand.

Appellants are put in no worse position. They have all the rights they would have had had the foreclosure proceeding been carried on to final judgment and sale. This is not a case where a debtor gives a preference to one creditor of equal standing with others, or a preference without countervailing advantage to the debtor or to the debtor's estate.

We do not feel called upon to discuss that phase of the law. It is no more than a voluntary agreement—between a creditor having a lawful advantage over other creditors, and the debtor—to extend the time and manner of payment of his debt. The theory upon which preferences are denounced is that, by the preference of one, another is denied the equality of advantage which the law guarantees to all.

The several National Bankruptcy acts state the law governing illegal and fraudulent preferences, and we may safely refer to the cases arising under these acts for authority to sustain our view that a mere change in the form of an existing security will not operate to the loss of a creditor.

"The conveyance of property to a creditor who has a valid lien on such property to a greater amount than the value of it is not a preferential sale." Loveland, Bankruptcy (4th ed.), § 531.

See, also, Brandenburg, Bankruptcy (2d ed.), § 30.

In *Catlin v. Hoffman*, Fed. Cas. No. 2,521, the one who was subsequently adjudged to be a bankrupt had purchased certain property and given a mortgage on the premises to secure the remainder. The mortgage was foreclosed and a decree entered against the mortgagor, the bankrupt. He afterwards gave a mortgage to secure the amount of the judgment, and another judgment taken upon an unsecured claim. The court sustained the mortgage to the extent of the original mortgage lien and the decree entered upon the foreclosure of it, saying:

"No case directly in point was cited on the argument, but I do not think that a conveyance by an insolvent debtor to his creditor of property, upon which said creditor already has a lien to a greater amount than the value thereof, is within the purview of the first clause of section 35 of the bankrupt act, and therefore void. . . .

"No preference is given by such a conveyance, and no other creditor is deferred or injured thereby. Unless some creditor is deferred or defrauded by such conveyance, no one can be preferred by it."

In *Coxe v. Hale*, Fed. Cas. No. 3,310, Hale held valid mortgages on the land of "E." "E" conveyed the land to Hale by deed. Upon suit brought by the assignee of "E," who was adjudged to be a bankrupt after the making of the deed, the court held that the taking of a deed was not a preference; that it lacked the element of intent, and further:

"There is no evidence, nor is there any claim, that that mortgage debt was not due in good faith, free from any impeachment, under the bankrupt law or otherwise, or that the mortgage lien was not perfect for the amount due. The deed, therefore, gave to Hale (the father-in-law), no preference. It could give none. He was entitled, by virtue of his lien, to the whole property already. . . .

"A foreclosure would have involved expense, necessarily reducing the net sum which could be realized on the mortgage-debt. So that, in fact, the conveyance, without foreclosure, operating to release the equity of redemption, so far from resulting in a preference to Hale over other creditors, had the effect of reducing the mortgage-debt to a greater extent than was otherwise possible, and, in that way, tended to the benefit of Eastman and his creditors."

So it is in this case. Fox had no preference by the mortgage. The relations and rights of the parties were not, in any way, changed or modified, unless it was to the advantage of appellants.

The substance of this case is the debt. The form is the security. The lien of Fox was not vulnerable to the attack of creditors, and it can avail them nothing that the form of his security was changed, so long as the substance remains.

This conclusion makes it unnecessary for us to discuss the many questions raised by counsel, or the contentions of the interveners. It is certain that the trust fund doctrine, which is most strenuously urged, cannot apply, for Fox's lien might have been asserted whether the company was solvent or insolvent at the time it was filed. It is made a preferred lien under the statute.

The judgment of the lower court is affirmed.

ELLIS, C. J., MAIN, MORRIS, and WEBSTER, JJ., concur.

[No. 13528. Department One. February 10, 1917.]

W. L. Swain *et al.*, *Appellants*, v. The City of Spokane, *Respondent*.[1]

Municipal Corporations—Streets—Defects — Bridge Railing—Negligence — Proximate Cause. A municipal corporation is not liable for injuries sustained when the steering gear of plaintiff's automobile refused to work, and the car, driven at slow speed, crossed the curb and sidewalk and went through the low wooden railing of a bridge at the side of the street; since the street was reasonably safe for ordinary travel, and there is no absolute duty to maintain railings in the absence of obvious danger, and the proximate cause of the accident was the defect in the automobile.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered April 5, 1916, upon sustaining a demurrer to the complaint, dismissing an action for personal injuries sustained by the driver of an automobile. Affirmed.

Roche & Onstine, for appellants.

H. M. Stephens, *Ernest E. Sargeant*, and *Dale D. Drain*, for respondent.

Ellis, C. J.—Action for personal injuries. The trial court sustained a general demurrer to the complaint. Plaintiffs filed an amended complaint in substance the same as the original. On motion of defendant it was stricken, and an order of dismissal was entered. Plaintiffs appeal.

The material facts alleged were as follows:

"That on or about 2:30 p. m. on the twelfth day of October, 1915, Charlotte B. Swain was riding in an Overland automobile, going east along the south side of East Sprague avenue and that said automobile passed over the west bridge and about two-thirds along the east bridge at the location known as Sprague avenue fill, between Arthur & Ivory streets on said East Sprague avenue, and about 65 feet from said Ivory street, said car was then and there being operated and driven at the rate of about seven to ten miles per hour, when

[1]Reported in 162 Pac. 991.

the steering gear of the said car suddenly failed to work and the car became beyond control and suddenly turned to the right and went over the curb-stone and across the sidewalk and struck against a temporary board fence which was built and maintained by the city on the high stone wall which constitutes the south side of the said bridge and roadway. Said car at the time it struck said fence was going at the rate of about two miles per hour [in amended complaint alleged about one mile per hour], but pushed through and over said fence and said car went over the edge of said bridge and stone wall and with said plaintiff fell about thirty-five feet to the ground, greatly and permanently injuring her and smashing and destroying said car."

This was followed by allegations of carelessness and negligence and want of ordinary care and caution on defendant's part in maintaining a five-inch instead of a nine or ten inch curbstone and in maintaining a board fence on the south side of the bridge or fill instead of a stone, cement or iron wall or railing. Damages were demanded for personal injuries to Charlotte B. Swain in the sum of $14,000, and for injuries to the automobile in the sum of $1,000.

Respondent moves that the appeal be dismissed for insufficiency of the notice, but since the judgment must be affirmed in any event, we pass at once to a consideration of the case on its merits.

Did the complaint show a violation of duty on the city's part? Appellants assert the affirmative, citing in its support four decisions of this court which we shall briefly consider.

In *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847, the plaintiff was injured by falling into an excavation extending into the street. The excavation was left unguarded and without danger signal or light. The accident occurred about seven o'clock in the evening in the month of December. The city was held liable, but in the course of its opinion, this court marks the limit of the city's duty in the premises as follows:

"A duty (when not expressly imposed by charter) arises to the public from the character of the powers granted to

keep its streets in a reasonably safe condition for use in the ordinary modes of travel, and it is liable to respond in damages to those injured by a neglect to perform such duty."

In *Kirtley v. Spokane County*, 20 Wash. 111, 54 Pac. 936, the question involved was whether the county was liable for injuries sustained by reason of a defective county bridge which fell while plaintiff, with his wagon and team, was crossing it. The court held the county liable, in that it had neglected the positive duty to keep the bridge in repair adequate to ordinary use.

In *Einseidler v. Whitman County*, 22 Wash. 388, 60 Pac. 1122, the county was building a new bridge a short distance from an old one which was still in use. In using iron from the old bridge, the county removed the guard rails from it. There had been a hole in the old bridge for some time and, on the day of the accident, it was filled with blocks and rubbish from the new one. The plaintiff was driving over the old bridge, when her team, taking fright at this pile of rubbish, backed off the approach and injured her. The court sustained a verdict for plaintiff, holding that it was for the jury to say whether or not the absence of rails or barriers was a contributing cause with the hole filled with rubbish combining to furnish the proximate cause of the injury.

In *Zolawenski v. Aberdeen*, 72 Wash. 95, 129 Pac. 1090, the plaintiff was injured by stepping through a hole in a bridge, which defect had existed for five or six months prior to the accident. Obviously there was a violation of the duty to keep the street reasonably safe for ordinary travel.

In each of these cases it will be noted that the use to which the bridge or street was being put by the person injured was the ordinary, reasonable use for which it was intended, and that the negligence causing the injury, and to which alone the injury was traceable, was failure to keep the street or bridge reasonably safe for such use. In the case before us, it is clear that, for all ordinary uses of the street reasonably to be anticipated, it was kept in a safe condition, and that, if

appellants' car had been equally fit for its intended purpose, the accident would not have happened. The defect in the car itself was plainly the proximate cause of the injury. The breaking of the railing was a mere condition. It could not reasonably be anticipated that a car, by reason of its own defects, would be driven over the curb, across the walk for pedestrians, and through the wooden railing at the side of the street. To hold the municipality liable in such a case would be to make it an insurer against every accident on its streets—in effect, an insurer of the tractability of every team and automobile driven on its streets. This exceeds the duty imposed upon a municipal corporation in relation to the care of its streets. The facts make a plain distinction between the cases above noticed and the one before us.

This case falls distinctly within the rule announced in *Leber v. King County*, 69 Wash. 134, 124 Pac. 397, 42 L. R. A. (N. S.) 267. The accident there involved happened on a county highway by reason of a horse, driven by the plaintiff, shying, losing his footing and falling down a bank at the roadside. Plaintiff charged the county with negligence in its failure to maintain a railing or barrier at the side of the road. We said:

"The duty to put barriers upon a highway, although travel thereon be in a degree dangerous, is not absolute. The law does not require it unless the danger complained of is unusual. . . . The unusual danger noticed by the books is a danger in the highway itself. . . . We take it, then, that the rule contended for applies only where a traveler exercising ordinary care would not expect to find danger, or where the natural or surrounding conditions would suggest protection; . . . The duty of the county is discharged if it maintains its highways reasonably safe for ordinary travel."

This measure of duty is in consonance with the better reasoned authorities generally.

In *Herr v. Lebanon*, 149 Pa. 222, 24 Atl. 207, 34 Am. St. 603, 16 L. R. A. 106, the plaintiff was a passenger in an omnibus drawn by one horse. The street passed along the side

of a hill. On the lower side there was a steep descent of several feet. There was no guard rail along the declivity. While ascending the hill in the middle of the roadway, the horse suddenly fell. In struggling to regain its feet, it rolled down the declivity, drawing the omnibus after it. Plaintiff was injured. In reversing a judgment for plaintiff against the municipality, the supreme court of Pennsylvania said:

"A road that is in suitable condition for ordinary travel, conducted in the ordinary manner, does not become defective because some extraordinary condition, not foreseen, arises, in consequence of which it is, for the moment, too rough or too narrow to meet all the exigencies of the situation. Whatever is so much out of the ordinary course as not to be naturally foreseen, as a probable result of the condition of the highway, the road authorities are not bound to provide against; and their neglect to make such provision can be neither a proximate nor a concurring cause of the injury received in consequence of such extraordinary happening."

In *Nichols v. Pittsfield*, 209 Pa. 240, 58 Atl. 283, a horse becoming frightened ran into a ditch at the side of the highway, causing the accident. The court said:

"To impute a failure of duty on the part of a township, where it has provided a public road suitable for the ordinary use of the same, because it failed to provide for a possible contingency that might arise from the fright of a horse not connected in any manner with any defect in the roadway, would be to impose a duty far beyond any reasonable requirements and without substantial reason therefor."

In *Kingsley v. Bloomingdale*, 109 Mich. 340, 67 N. W. 333, it appeared that the plaintiff had safely crossed a township bridge so that the rear wheels of his carriage were eight feet or more from the bridge, where he stopped to talk with a neighbor. The horse got the checkrein over the thill and backed onto the bridge and off at its side. The court said:

"We have held, in some cases, that circumstances might require railings, but in no case have we gone so far as to hold that a highway or bridge required fencing, except in cases of obvious danger."

In *McClain v. Garden Grove*, 83 Iowa 235, 48 N. W. 1031, 12 L. R. A. 482, plaintiff was traversing a bridge in a cutter drawn by one horse. The bridge was twelve feet wide and was provided with railings. About midway of the bridge, the horse suddenly fell against the railing, broke it down, and dropped off, drawing with him the cutter and its occupants. Plaintiff was injured. In affirming a directed verdict in favor of the defendant, the court noted that the railing of the bridge was about two and one-half feet high, and that it might be true that, had it been of sufficient height and strength to bear the weight of the horse, the accident would have been avoided, but held that defendant was not an insurer against accidents, further saying:

"It was its duty to provide for the use of the bridge in the usual manner, and to guard against ordinary contingencies, or those which might be reasonably apprehended."

In *Hubbell v. Yonkers*, 104 N. Y. 434, 10 N. E. 858, 58 Am. Rep. 522, it appeared that, on each side of the roadbed thirty feet wide, there were sidewalks ten feet wide and separated from the roadway by a curbstone eight inches high. On one side of the street was an unguarded declivity of about twelve feet. A horse drawing a wagon suddenly took fright, dashed across the sidewalk and down the embankment, overturning the wagon and injuring the plaintiff. The New York court of appeals exonerated the city, saying:

"The city is not an insurer of the safety of persons traveling its streets, nor is it bound to furnish an absolutely safe and perfect highway under all circumstances."

The decisions of this court in *Teater v. Seattle*, 10 Wash. 327, 38 Pac. 1006, and *Dignan v. Spokane County*, 43 Wash. 419, 86 Pac. 649, are in harmony with the decisions above discussed. Each of those cases, it is true, involved the excessive force of a runaway team. Such a contingency, however, is no more extraordinary nor less to be anticipated than the eccentricities of an unmanageable automobile.

We conclude that the appellants failed to state a cause of action. The judgment is affirmed.

MORRIS, MAIN, CHADWICK, and FULLERTON, JJ., concur.

[No. 13470. Department One. February 13, 1917.]

VERMONT FARM MACHINE COMPANY, *Appellant*, v. GEORGE W. LAMKA, *as Vancouver Implement Company, Respondent*.[1]

NEW TRIAL—TIME FOR MOTION. Under Rem. Code, § 402, providing that a motion for a new trial must be made within two days after the verdict, a motion for new trial made more than two years after the verdict cannot be considered.

Appeal from a judgment of the superior court for Clarke county, Jackson, J., entered November 10, 1915, upon the verdict of a jury rendered in favor of the defendant, in an action on contract. Affirmed.

Arthur I. Moulton, for appellant.

Percival & Talbot and *McMaster, Hall & Drowley*, for respondent.

MAIN, J.—The purpose of this action was to recover the balance alleged to be due for goods, wares and merchandise sold and delivered. The defendant admitted the purchase and delivery, and pleaded affirmatively that it had been mutally agreed between the plaintiff, the defendant and one George E. Corsen, that Corsen would pay to the plaintiff the amount due, in the place of the defendant, and that the plaintiff would look to Corsen alone for the payment, and the defendant should be released from the obligation. The affirmative defense pleaded in the answer was denied by the reply. The issue thus framed was tried to a jury, and resulted in a verdict for the defendant. After the verdict was

[1]Reported in 162 Pac. 984.

returned, and before it was entered, the plaintiff interposed a motion for judgment notwithstanding the verdict. The verdict was returned and entered on the 30th day of January, 1913. Thereafter no further steps were taken in the cause until the 7th day of October, 1915, when the plaintiff made a motion for a new trial. The ground of this motion was that the notes of the court reporter, who had been employed by the plaintiff to report the case at the time of the trial, had been lost, and that, owing to the lapse of time, a bill of exceptions could not be prepared without the aid of the reporter's notes. On the 8th day of November, 1915, the motion for a new trial and a motion for judgment notwithstanding the verdict were overruled by the trial court, and a judgment entered upon the verdict. From this judgment, the plaintiff appeals.

Whether the facts upon which the motion for a new trial in this case are based are included within the statutory grounds for a new trial, and whether, if not so included, the court has any inherent power to grant a new trial for other than statutory grounds, are questions which are not properly here to be considered, and upon which no opinion will be expressed. No extension of time had been granted by the trial court in which a motion for a new trial could be made, and the motion for a new trial was made approximately two years and eight months after the verdict was returned and entered. The statute, Rem. Code, § 402, provides that the party moving for a new trial must, within two days after the verdict of a jury, file with the clerk, and serve upon the adverse party, his motion for a new trial, designating the grounds upon which it is made. There being no extension of time in which the motion for a new trial might be made, and the motion not being made within the statutory two days, it cannot be considered. The motion was made without authority of law, and therefore presents no question for determination. *Grove v. Morris*, 31 N. D. 8, 151 N. W. 779; *Hedekin Land*

& Improvement Co. v. Campbell (Ind.), 112 N. E. 97; *Haviland v. Southern California Edison Co.*, 172 Cal. 601, 158 Pac. 328.

The judgment will be affirmed.

ELLIS, C. J., CHADWICK, MORRIS, and WEBSTER, JJ., concur.

[No. 13615. Department One. February 13, 1917.]

GOLD CREEK ANTIMONY MINES & SMELTER COMPANY, *Appellant*, v. C. E. PERRY *et al.*, *Respondents*.[1]

MINES AND MINERALS—LOCATIONS—NOTICE—"VACANT AND UNOCCUPIED"—STATUTES. The purpose of U. S. Rev. Stats., § 2324, and Rem. Code, § 7359, requiring mining locations to be marked upon the ground, being to give notice to prospectors, and being liberally construed in favor of locators, one who for years was familiar with the boundaries of a claim and knew that it had been worked and much money expended in annual assessments, cannot locate the same as "vacant and unoccupied" and assert insufficiency of the prior location notice.

SAME—LOCATIONS—FORFEITED GROUND—REQUISITES. One locating mining ground as "vacant and unoccupied," knowing that it was not so, is not entitled to claim as a locator of forfeited ground, without compliance with Rem. Code, § 7365, requiring relocation notices on claims to abandoned property; hence he is not entitled to show that the last annual assessment of the prior locator was not paid, which fact is immaterial.

SAME—LOCATIONS—MARKING. As against subsequent locators, a mining location is sufficient when distinctly marked upon the ground so that its boundaries can be readily traced.

Appeal from a judgment of the superior court for Okanogan county, Pendergast, J., entered July 29, 1915, upon findings in favor of the defendants, in an action to recover the possession of mining claims, tried to the court. Reversed.

J. Grattan O'Bryan (*J. A. Rokes*, of counsel), for appellant.

C. W. Strother, for respondent.

[1]Reported in 162 Pac. 996.

Morris, J.—This action involves the right of possession of certain antimony mining claims in Okanogan county. The claims were first located in 1906, 1907 and 1908 by appellant's grantor, and passed into possession of appellant in 1908. Since acquiring it, appellant has expended approximately $25,000 in developing the property, installing mining equipment, digging water ditches, constructing roads, tunnels, crosscuts and other workings, and doing the annual assessment work each year until 1914. In April, 1915, respondent Perry went upon the property and located the greater part of it as vacant and unoccupied government land. Perry's location boundaries took in nearly all the workings and improvements upon the original locations, including the tunnels constructed by the appellant, from which Perry began removing ore until restrained by the lower court upon the commencement of this action in July, 1915. Upon the final hearing in the lower court, findings in favor of Perry were entered, and this appeal followed.

The decisive question is, Was the property vacant and unoccupied government land in April, 1915? Perry was a miner, and had lived in the vicinity of these claims since 1897. He was familiar with the ground, knew it was included within appellant's location, and had assisted in doing the assessment work in the fall of 1913. So far as Perry's knowledge is concerned, there is no doubt but that he was well acquainted with the claims and knew the ground which he attempted to locate in April, 1915, as vacant and unoccupied was included within the original locations claimed by appellant.

The purpose of the requirement of U. S. Rev. Stats., § 2324, requiring locations to be distinctly marked upon the ground, with the name of the locators, the date of location, and such reference to natural objects or permanent monuments as will identify the claims, with the additional requirements of Rem. Code, § 7359, is to give notice to prospectors who are looking for mineral locations of what has already been appropriated, in order that they might govern them-

selves accordingly. Another purpose served is to prevent fraud by swinging or floating. In accomplishing this purpose, courts are inclined to be liberal with those making mining locations, and are not inclined to defeat the claim of him who has in good faith attempted to comply with the requirements of the law by technical criticism of the acts relied upon to constitute a valid location. *Book v. Justice Min. Co.*, 58 Fed. 106; *Walton v. Wild Goose Min. & Trading Co.*, 123 Fed. 209.

Since one of the main purposes of these location statutes is the giving of notice that the ground is no longer vacant and unoccupied, it would seem that one in the position of respondent, who has been acquainted with the ground for years and familiar with its workings, who has assisted in doing the assessment work approximately a year and a half prior, must, indeed, make out a strong case of failure of compliance with necessary requirements before he can be heard to say the ground was vacant and unoccupied, and subject to location by him. The reasoning of this court in cases of like issue (*Davis v. Dennis*, 43 Wash. 54, 85 Pac. 1079; *National Milling & Mining Co. v. Piccolo*, 54 Wash. 617, 104 Pac. 128) is so pertinent as to leave but little more to be said. In the first of these cases, which was an action to recover possession of coal lands from those who had entered upon and taken possession under a claim that the land was vacant and subject to entry, we said, referring to the defendants:

"They are seeking to take advantage of the respondents' labor and expenditures, and are beyond the pale of consideration in so far as there is any equity or justice in their claims. Their right must rest on the naked fact that the property was unoccupied when they entered upon it, and inasmuch as they failed to show this fact, the judgment of ouster against them was rightfully entered."

In the second case, an action to recover possession of mining claims which defendant attempted to locate upon as

vacant and unoccupied, the defendant there, as here, raised the issue of insufficiency of the original location notice. We disposed of this claim by saying:

"Moreover, it is manifest that the appellant was not deceived or misled by any false or deficient description. It plainly appears that he knew the boundaries of the claims and entered within them for the purpose of acquiring for himself the benefit of the respondent's labor and expenditures, believing that the respondent had forfeited its rights, not in ignorance of such rights, nor for want of a sufficient description of the property in the location notices. The purpose of description is to give notice, and since the appellant had notice, it would seem that he was not in a position to complain of technical defects which in no way affected his rights."

This case was reversed upon rehearing, *National Milling & Mining Co. v. Piccolo*, 57 Wash. 572, 107 Pac. 353, upon a question of statutory construction, not affecting its authority as here cited. The courts have ever given effect to like considerations in cases of this character. *Bismark Mountain Gold M. Co. v. North Sunbeam Gold Co.*, 14 Idaho 516, 95 Pac. 14; *Eaton v. Norris*, 131 Cal. 561, 63 Pac. 856.

The lower court seems to have been influenced by the fact that appellant had not done its assessment work for 1914, and the ground was, for this reason, subject to relocation. This fact is referred to in the oral decision of the court, and recited as a premise in the judgment. So far as the issues now involved are concerned, this is immaterial. Respondent is claiming, not as a relocator of forfeited ground, but as a locator upon vacant and unoccupied ground. It may be that, when respondent went upon the ground in April, 1915, knowing the assessment work for the previous year had not been done, his intention was to relocate upon forfeited ground, but, if so, his intention avails him naught, because of his failure to comply with Rem. Code, § 7365, requiring relocation notices to state if the whole or any part of the new

location is located as abandoned property. We have upheld this as an indispensable requirement in *National Milling & Mining Co. v. Piccolo, supra*, and *Florence-Rae Copper Co. v. Kimbel*, 85 Wash. 162, 147 Pac. 881.

We shall not cite the record as to the character or extent of the original locations. To do so would compel a recital of too much of the evidence. We are satisfied it was sufficient to comply with all necessary requirements in so far as the attack now made is concerned, which is all that need be said. As against subsequent locators, it is a sufficient compliance with the law when the location is distinctly marked on the ground so that its boundaries can be readily traced. *Book v. Justice Min. Co., supra; Haws v. Victoria Copper Mining Co.*, 160 U. S. 303. The record is sufficient to show that this was done.

The judgment is reversed, and the cause remanded with instructions to enter judgment for appellant as prayed for.

Ellis, C. J., Main, Chadwick, and Webster, JJ., concur.

[No. 13484. Department Two. February 14, 1917.]

S. G. LIPSETT, *Appellant*, v. WILLIAM DETTERING, *Respondent*, CHARLES STRANDBERG & COMPANY *et al.*, *Defendants*.[1]

BILLS AND NOTES—EXTENSION OF TIME—CONSIDERATION—EVIDENCE—SUFFICIENCY. Where the plaintiff was the holder of notes given in payment of the purchase price of mining machinery, and was also the owner of a water right leased to the maker of the notes, who had paid $1,600 on the notes to plaintiff's agent and was unable to proceed in his operations without the water, the maker's consent to divert $600 of such payment and apply the same to payment of the lease of the water is sufficient consideration for plaintiff's extension of time for payment of the balance due on the notes for the period of one year.

PRINCIPAL AND SURETY—RELEASE—EXTENSION OF TIME. An agreement between the payee and the principal maker of a note to extend the time of payment for one year, releases the surety on the note, if the agreement is made upon a valuable consideration and without the consent of the surety.

STATUTES—PLEADING—AMENDMENT—SUFFICIENCY. The general allegation as to the laws of Alaska on a certain subject is sufficiently amended at the trial by an amended complaint setting forth the specific statutes relied upon and alleging that it was the only regulation on the question in the statutes of Alaska.

SAME—EVIDENCE—FOREIGN LAWS. A printed copy of the statutes of Alaska and the evidence of an attorney that the volume contained all the statutes in that territory on the subject in question, is sufficient *prima facie* proof of the laws of Alaska on the subject.

EVIDENCE—EXPERTS—ATTORNEYS—QUALIFICATION—DISCRETION. An attorney testifying as to the laws of Alaska, as shown by a code, sufficiently qualifies as an expert where he testified that he had practiced law in that territory for three years and was so practicing when the code took effect; the qualification of an expert being largely within the discretion of the trial court.

PLEADING—TRIAL—AMENDMENT—DISCRETION. Where a complaint alleges generally the effect of the laws of a foreign state, it is discretionary to allow a trial amendment setting forth the specific law relied upon.

APPEAL — PRESERVATION OF GROUNDS—INSTRUCTIONS — REQUESTS. Error cannot be assigned upon the failure of an instruction to define

[1]Reported in 162 Pac. 1007.

the phrase "valuable consideration," in the absence of any request therefor, an exception alone not being sufficient to take advantage of an omission.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 29, 1916, upon the verdict of a jury rendered in favor of the defendant, in an action on promissory notes. Affirmed.

S. D. Wingate and *J. F. Knight*, for appellant.

Griffin & Griffin, for respondent.

FULLERTON, J.—This is an action, brought in the superior court of King county, to recover upon three promissory notes, made and delivered to the plaintiff at Iditarod, Alaska, on October 2, 1912, by Charles Strandberg & Company, Emma C. Strandberg and William Dettering. While all of the makers were named as defendants in the action, service was had on the defendant Dettering only, the other defendants being without the territorial jurisdiction of the court.

The complaint was in the usual form. In it the notes were set forth by copy, and it was alleged that nothing had been paid thereon and that the same were due and owing. Judgment was demanded for the amount claimed to be due. Dettering, in his answer to the complaint, made certain denials and set forth four affirmative defenses. In the first of the affirmative defenses he pleaded payment. In the second, he pleaded that the notes were made and delivered in the territory of Alaska; that he received no part of the consideration of the notes, and that while he signed the same as a maker, he was in fact only a surety thereon, which the plaintiff well knew; that, on the maturity of the notes, the appellant, without his knowledge or consent, extended the time of the payment thereof for one year; that, under and by virtue of the laws of Alaska, such extension of time released him from liability on the notes. For a third defense, he pleaded want of notice of nonpayment at the time of the maturity of the

notes. For a fourth defense, he pleaded fraud and deceit on the part of the plaintiff in the procurement of the notes.

The allegations of the affirmative defenses were put in issue by a suitable reply. On the issues thus framed, the cause was tried to the court sitting with a jury. At the conclusion of the defendant's evidence, the plaintiff moved for a directed verdict in his favor, contending that the evidence submitted on the defendant's part did not constitute a defense. The court overruled the motion and, at the same time, allowed the defendant to amend so as to set forth more definitely the laws of Alaska relating to sureties on negotiable paper. The cause then proceeded to a close of the testimony, at which time the court withdrew all of the defenses save the second as amended at the time of the trial, submitting to the jury the questions whether the defendant was a surety upon the notes, whether there had been an extension of time for their payment, made upon a valuable consideration, and whether such extension, if made, was without the knowledge and consent of the defendant. The jury returned a verdict for the defendant, whereupon the plaintiff moved for judgment notwithstanding the verdict. This motion was denied, and judgment entered for the defendant upon the verdict of the jury. The plaintiff appeals.

Noticing the assignments of error in a somewhat different order from that in which the appellant presents them, the first to be considered is that the evidence is insufficient to support the verdict. The particular contention in this regard is that there was no evidence showing, or tending to show, a consideration for the extension of the time of payment of the notes. The notes were given as part of the purchase price of certain mining machinery and other personal property sold by the plaintiff to Charles Strandberg & Company. The appellant claimed to own a water right in a certain stream near the mining property, and this he leased to the purchaser at an annual rental of $1,200, payable in two installments of equal amounts. Concerning the trans-

action had at the time of the extension of the payment, Charles J. Strandberg, a member of the partnership of Charles Strandberg & Company, testified as follows:

"Mr. Lipsett came to Iditarod in the early part of September, 1913, and called on me for the money due on the notes and lease for water right, etc. I then explained to him that up to that time we had not been able to do any successful mining, on account of lack of water; I also informed him of the trouble we had had and were having with Riley & Marston, and that they claimed the water of Slate creek adversely to us. He then and there represented to me, and reassured me that he was the sole and prior owner of that water right, and that we certainly had the right to use it. He then and there instructed me not to let Riley impose on me any further, and to protect that water right in the courts if necessary. I showed him where I had gone away behind in my affairs and in the affairs of Strandberg & Co. on account of this lack of water. Everything was in arrears including the men's wages and grocery bills, and that I was ready to quit. I had a short time previously paid Erickson [the plaintiff's agent] $1,600 on account of the notes, but Lipsett wanted part of the payment, viz: $600 thereof applied to the payment of the lease and the balance to the notes, which I agreed to. In consideration of all of the circumstances and the application of the payment to the lease, he then and there agreed to extend the time of payment for the balance due him on the notes and lease for another year, if I would continue; and again directed me to protect that water right at all hazards and not to let Riley & Marston bluff me out. He also promised to see them. After this Mr. Lipsett went away, evidently satisfied because I would continue, and I did continue working. This was in September, 1913. The opposition of Marston & Riley continued, but it was so close to the end of the mining season that I took no steps to effectually stop them at that time. The mining season closed in the early part of October that year."

While the appellant disputed in some particulars the statements of the witness, it was for the jury to determine wherein the truth lay, and we are concluded by their findings. The jury were warranted in finding from this, we think, that the

appellant, in consideration of the application of certain moneys paid on the obligations due him from the debtor, in a way different from that directed by the debtor—that is to say, in consideration of being permitted to divert $600 of the $1,600 paid to be credited on the notes on which the surety was liable to an obligation on which the surety was not liable—consented to extend the time of payment of the notes for a definite period. This clearly is a promise founded upon a sufficient consideration. After accepting the conditions on which the debtor consented to change the application of the money paid, the creditor could not have enforced collection of the notes before the period of extension expired.

The appellant makes the further contention that the surety consented to the extension. But on this question, also, as we view the record, the most that can be claimed is there was a dispute in the testimony. Doubtless the jury could well have found that consent to the extension was given by the surety, but since he denied the fact and offered testimony tending to substantiate his denial, the question became one of fact for the jury, not one of law for the court.

It is settled law in a jurisdiction where the common law obtains that an agreement made between the payee and the principal debtor to extend the time of payment of a note for a definite period releases a surety, if the agreement is made upon a valuable consideration and without the consent of the surety. *Warburton v. Ralph*, 9 Wash. 537, 38 Pac. 140; *Binnian v. Jennings*, 14 Wash. 677, 45 Pac. 302; *MacDougall v. Walling*, 15 Wash. 78, 45 Pac. 668, 55 Am. St. 871; *Merchants' Bank of Port Townsend v. Bussell*, 16 Wash. 546, 48 Pac. 242. The case of *Bradley Engineering & Mfg. Co. v. Heyburn*, 56 Wash. 628, 106 Pac. 170, 134 Am. St. 1127, cited by the appellant, is not contrary to this principle. That case was decided after the enactment of the negotiable instruments act, which, as pointed out in the opinion, changed the prevailing rule with respect to an accommodation maker.

The appellant further complains that there was no sufficient plea or proof of the laws of Alaska relating to negotiable instruments, and that the court erred in not withdrawing the case from the jury for that reason. The defendant, in his amended answer set forth this branch of his defense in the following language:

"That in the district of Alaska, where said promissory notes and each of them were made and where the plaintiff extended the time of payment to the defendant Strandberg for an additional year within which to pay said notes, by the law of said District of Alaska this defendant as surety only was released thereby from the payment of said notes or any portion or part thereof, and that by the action of the plaintiff in extending the time to the only defendants who received any of the consideration of said promissory notes, this defendant was released and relieved from all liabilities upon said promissory notes and each of them."

When the allegation was questioned at the trial, the court permitted the defendant to set forth the specific statute on which he relied, and by alleging that it was the only statutory regulation on the question in the statutes of Alaska. The plea as amended was sufficient. It clearly informed the other party of the fact on which the pleader relied, and this is the sole purpose of a pleading.

The proofs offered to sustain the plea were a printed copy of the statutes of Alaska, and the evidence of an attorney to the effect that the volume contained all the statutes in that territory relating to negotiable paper in force at the time of the execution of the notes and the time the extension was given. To this there was no controverting evidence, and it is sufficient *prima facie* to sustain the issue.

In this connection it is further contended that the witness giving the testimony did not properly qualify. But the witness testified that he had practiced law in that territory for three years and was so practicing when the code went into effect. The question of the qualification of an expert is largely one of discretion with the trial court, and its ruling

on the question of such qualification will not ordinarily be disturbed by the appellate court. At least, there must appear a gross abuse before interference is justified, and we find no such abuse in this instance.

It is next objected that the court erred in allowing a trial amendment to the answer, but this, again, was within the discretion of the court. The appellant was in no manner misled by the amendment. It was not a question of introducing a new defense of which he had no notice, but one of the sufficiency of a defense attempted to be pleaded in an answer to which the plaintiff had made reply. No abuse of the discretion of the trial court is manifest.

In its instruction to the jury concerning the extension of the time of payment of the notes, the court charged them that, before they could find that there had been a valid extension of time, they must find that the extension had been made upon a valuable consideration, but did not instruct them as to the meaning of the phrase "valuable consideration." The failure to define this particular term is assigned as error. But, conceding that it would have been error to refuse to define the term under other circumstances, we do not think the question is open to appellant here. The record fails to show any request for a definition, or any request for a more specific instruction on the matter. The plaintiff confined himself to an exception merely. There is a distinction in this respect between misdirection of the jury and mere nondirection. The former may be taken advantage of by an exception to the instruction, but to take advantage of the latter, the trial judge's attention must be called to the specific omission and a request made for an instruction on the particular matter. *Cogswell v. West St. & N. E. Elec. R. Co.*, 5 Wash. 46, 31 Pac. 411; *Enoch v. Spokane Falls & N. R. Co.*, 6 Wash. 393, 33 Pac. 966; *Allend v. Spokane Falls & N. R. Co.*, 21 Wash. 324, 58 Pac. 244; *Howe v. West Seattle Land & Imp. Co.*, 21 Wash. 594, 59 Pac. 495; *Tacoma v. Wetherby*, 57 Wash. 295, 106 Pac. 903; *State v. Johnson*,

19 Wash. 410, 53 Pac. 667; *State v. Ross*, 85 Wash. 218, 147 Pac. 1149.

"It is, then, a general rule of procedure, subject, in this country, to a few statutory innovations, that, mere *non-direction*, partial or total, is not ground of new trial, unless specific instructions, good in point of law and appropriate to the evidence, were requested and refused. A party cannot, by hereby excepting to a charge, make it the foundation for an assignment of error, that it is indefinite or incomplete. The rule rests upon the soundest foundation. The facts of the case come to the mind of the judge as matters of first impression, and it will often be extremely difficult for him, in the short time allowed for a trial before a jury, and in the midst of such a trial, to prepare a series of instructions applicable to all the hypotheses presented by the evidence. On the other hand, counsel are presumed to have studied their case beforehand; to come to the court with a fair understanding of the facts which will probably be proved, and with a full knowledge of the law applicable to those facts. It is, therefore, their duty to give attention to the charge of the judge, and if, in their opinion, it omits to give direction as to the law applicable to any essential feature of the evidence, to call his attention to the omission and to request appropriate supplementary instructions; and where they fail thus to call his attention to something which he may fairly be supposed to have omitted from inadvertence, they ought not to be allowed to complain of the omission in an appellate court. A rule which would allow them to do so would be extremely inconvenient. It would multiply new trials and reversals, and often on grounds which have no connection whatever with the merits." 2 Thompson, Trials (2d ed.), § 2341.

We find no error in the record, and the judgment will stand affirmed.

MORRIS, PARKER, MOUNT, and HOLCOMB, JJ., concur.

[No. 13485. Department Two. February 14, 1917.]

D. W. SHILLIAM, *Respondent*, v. WILLIAM M. NEWMAN *et al.*, *Appellants*.[1]

MUNICIPAL CORPORATIONS — STREETS — ACCIDENTS AT CROSSINGS — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. The driver of a team, struck by an automobile at a street intersection in the residential district of a city, is not guilty of contributory negligence, as a matter of law, where there was evidence to the effect that he was driving at a speed of six or seven miles an hour, in a direction which, under a traffic ordinance, gave him the right of way, and was struck by an automobile exceeding the speed limit.

RELEASE — CONSIDERATION — VOLUNTARY PAYMENTS AND SERVICES. In an action for personal injuries sustained by plaintiff when struck by defendant's automobile, a release signed by the plaintiff, in consideration of the payment of plaintiff's hospital bills and bills for repairing his wagon and for defendant's services as a physician in attending the plaintiff, is inadmissible upon a plea of accord and satisfaction, where it appears that payment of the hospital bills and the services of the physician were voluntary, which, with payment for the property, constituted no consideration for a release of damages for the personal injuries.

EVIDENCE — ADMISSIONS — CONSIDERATION FOR RELEASE. In an action for personal injuries, upon a plea of satisfaction and accord, a release which was without consideration would not be admissible because it contained a statement that the accident was purely an accident for which the defendant was in no way responsible.

APPEAL — REVIEW — HARMLESS ERROR — EVIDENCE. Rejection of written evidence of an admission against interest is harmless error, where there was oral evidence of such admission, without contradiction by the plaintiff.

APPEAL — REVIEW — WAIVER OF ERROR. The withdrawal of a motion for a new trial on the ground that there was no ground upon which the verdict should be vacated and that there were no errors in law or otherwise, tends to sustain the judgment.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 4, 1915, upon the verdict of a jury rendered in favor of the plaintiff, in an action

[1]Reported in 162 Pac. 977.

for personal injuries sustained through a collision with an automobile. Affirmed.

Skuse & Morrill, for appellants.

McCarthy, Edge & Davis (*W. G. Boland* of counsel), for respondent.

HOLCOMB, J.—The facts in support of the verdict in this case, relied upon by the respondent and which were resolved by the jury in his favor, are substantially these: On the evening of March 16, 1915, respondent was driving his team southward on Hatch street, in the city of Spokane. While crossing Twenty-fifth avenue, which runs east and west, his wagon was struck by the automobile owned by appellants and driven by appellant William M. Newman, driving eastward on Twenty-fifth avenue at the intersection of Hatch street. Respondent's wagon was smashed, his team ran away, and he suffered severe injuries which necessitated his removal to a hospital, where he was kept for several days and then taken to his home. Another man was with respondent at the time, and both testified that respondent was driving his team southward onto the intersection of Hatch street and Twenty-fifth avenue at the speed of approximately six or seven miles an hour. There was testimony, that appellant approached the intersection from the west at a speed of approximately thirty-five or forty miles an hour; that respondent was driving his team in a careful and prudent manner; that Hatch street is not paved, but Twenty-fifth avenue is paved and affords excellent facility for automobile travel. The provisions of a traffic ordinance of the city of Spokane were pleaded and proven as follows:

"Sec. 8. Horse-drawn vehicles shall have the right-of-way over power-driven vehicles, street cars excepted. Vehicles going in a northerly or southerly direction shall have the right-of-way, except where traffic officers are stationed."

"Sec. 18. No vehicle shall travel at a speed faster than fifteen (15) miles an hour when inside of the fire limits, nor

faster than twenty (20) miles an hour when outside the fire limits." Ordinance, Spokane, No. C1832.

It is admitted that the place where the accident occurred is not a place where traffic officers are stationed, and there was evidence that the place was a residential and not a business section of the city. There are no complaints on the part of appellants as to the submission or refusal of any instructions to the jury, except the refusal of an instruction to find for the defendants.

Appellants contended that respondent was guilty of contributory negligence, and relied chiefly upon the decision of this court in *Jones v. Wiese*, 88 Wash. 356, 153 Pac. 330. That case cannot be considered as parallel. In that case the injury occurred at a crowded street crossing in the city of Seattle, and Judge Morris, in speaking of the duty of pedestrians at street crossings, said:

"When about to attempt a street crossing at such a place where danger is imminent and constant, pedestrians must take some precautions to guard against it. Something must be done to insure safety, and the failure to do so is such negligence as will prevent recovery in case of injury."

In the case at bar, the injury did not occur in the congested part of the city where traffic is heavy and continuous, but in a purely residential portion of the city upon streets not heavily traveled. Respondent was driving a team, and was driving in a direction which, under the ordinance, gave him the right of way. In such case, there rested a greater duty upon appellants than upon respondent to avoid a collision and injury. The evidence is somewhat in conflict, but we do not find any condition in the evidence that would justify us in holding, as a matter of law, that the respondent neglected anything which it was his duty to perform, so as to render him guilty of contributory negligence. *Johnson v. Johnson*, 85 Wash. 18, 147 Pac. 649.

Another claim of error by appellants is that the trial court excluded from the jury an instrument, signed by respondent,

in the nature of an accord and satisfaction, which was pleaded and attempted to be proven by appellants. It was shown that this instrument, which was admitted to have been signed by respondent, was in the nature of a release, and was in consideration of the payment by appellants of the hospital bills, the bill for repairing the wagon, and for physician's services by appellant William M. Newman, who is a physician, to the respondent. This court held in *Kennedy v. Spokane, Portland & Seattle R. Co.*, 73 Wash. 389, 132 Pac. 50, 46 L. R. A. (N. S.) 419, that the furnishing of medical services by an employer to an employee, for injuries received by the employee through the employer's negligence, constitutes no consideration for a release of the damages for the personal injuries received by the employee. This case is similar, in that the payment of the hospital bills and the furnishing of physician's services were voluntary so far as respondent is concerned, and there was no relation of debtor and creditor established between them. The injuries to the respondent's property would fall within the same class. The payment of these claims, therefore, would not constitute consideration for a release from personal injuries done to respondent if appellant was negligent, and that was a question to be determined by the jury. If not negligent, then, of course, no liability was created and no release was necessary.

It is contended, also, by appellants that the instrument in question contained a statement, over the signature of respondent, which declared that the collision was purely an accident for which the appellant William M. Newman was in no way responsible. Such a clause was not involved in the *Kennedy* case; but as to that, if there was no consideration for an agreement of release, there was no consideration for an agreement that there was no responsibility or liability on the part of appellants. Furthermore, there was oral evidence on the part of both appellants and respondent as to alleged declarations, made by respondent when he was in the hospital and afterwards, that there was no liability

attaching to appellants, and contradiction thereof by respondent. Thus, the prior declaration against interest, if any, on the part of respondent went to the jury upon the oral evidence, and the rejection of the written declaration cannot be held to prejudice appellants.

We feel somewhat sustained in our position by the fact that, after judgment, appellants moved for a new trial, but, before the motion was heard, they moved for leave to withdraw that motion, in the following language:

"Now appear the above named defendants and move the court for leave to withdraw their motion made herein to vacate the verdict heretofore rendered and for a new trial, upon the ground and for the reason that after further consideration of the premises, the defendants have concluded that they have no grounds upon which the verdict should be vacated and a new trial granted, and that there are no errors either in law or otherwise in said action."

With the above statement we must agree, and the judgment is affirmed.

FULLERTON, MOUNT, MORRIS, and WEBSTER, JJ., concur.

[No. 13651. Department Two. February 14, 1917.]

JACOB SCHWEITER, *Respondent*, v. JOSEPH J. HOOKER *et al.*, *Appellants*.[1]

HUSBAND AND WIFE—SEPARATE PROPERTY—MORTGAGE — SIGNATURE OF WIFE. Where a man obtained record title to land by fraud, his wife has no community interest in the property; hence a mortgage thereon is not invalid because not signed by the wife, as against an innocent mortgagee.

SAME—MORTGAGES—RATIFICATION BY WIFE. A wife signing a conveyance of land subject to a mortgage purporting to be signed by her, ratifies the mortgage.

SAME—FORECLOSURE—DEFENSES—RATIFICATION. One who accepts a deed subject to a mortgage cannot, as against an innocent mortgagee, defend a suit to foreclose the mortgage on the ground that the mortgage was not signed by the wife of the mortgagor.

ESTOPPEL—LACHES. The owner of property who suffers another to take title and accepts a deed from him subject to mortgage and pays interest on the mortgage for three years, is guilty of laches precluding any defense to a suit to foreclose the mortgage.

Appeal from a judgment of the superior court for Asotin county, Miller, J., entered July 3, 1916, upon findings in favor of the plaintiff, in an action to foreclose a mortgage, tried to the court. Affirmed.

C. H. Baldwin, for appellants.

E. J. Doyle, for respondent.

FULLERTON, J.—This is an appeal from a decree foreclosing a mortgage held by respondent. The record discloses that appellants, J. J. Hooker and wife, owned 480 acres of land in Klickitat county, Washington. R. L. Hooker, a brother of J. J. Hooker, was a real estate agent with offices at Spokane, and through his activities the land in Klickitat county was traded for an apartment house in Spokane. By some means, not clearly pointed out in the evidence, R. L.

[1]Reported in 162 Pac. 981.

Hooker fraudulently caused his own name to be inserted as grantee in the deed which conveyed title to the apartment house in consideration of the land in Klickitat county. Subsequently R. L. Hooker traded the apartment house for the land in controversy, taking a deed thereto again in his own name. At the time he received title to this land he was a married man. On April 12, 1913, he executed a note, and to secure the same he also executed a mortgage on the premises in question. This mortgage appears, in part at least, to have been an extension of a previous mortgage on the premises, and was signed "R. L. Hooker" and "Frona Hooker." Shortly afterwards R. L. Hooker and wife executed a deed purporting to convey title to these premises to J. J. Hooker, and the same was delivered to him some time in May or June, 1913. This deed specifically provided that the land was conveyed free from all incumbrances except the mortgage in question. J. J. Hooker accepted the deed and paid interest on the mortgage for a period of time approximating two years. Respondent then instituted this action for the purpose stated above. R. L. Hooker, Frona Hooker, his wife, and J. J. Hooker and wife were named as defendants therein. R. L. Hooker and wife failed to appear and allowed a default to be taken against them, but J. J. Hooker and wife appeared and set up the defense that Frona Hooker's signature to the mortgage was a forgery and that the mortgage was therefore void. From a decree foreclosing the mortgage, J. J. Hooker and wife alone have appealed.

Appellants argue that, since the signature of Frona Hooker was a forgery and she had a community interest in the property, the mortgage is absolutely void and cannot be ratified. Several cases are cited to support this contention, but they are all cases where the injured wife is complaining against her husband. Here neither Frona nor R. L. Hooker is a party to the appeal, and this is a controversy between an innocent mortgagee and a subsequent grantee. In any event, even granting that the signature of Frona Hooker was

forged, appellants' contention cannot prevail. We think it erroneous to assume that this property was the community property of R. L. Hooker and wife, for from the very inception of these transactions gross fraud was practiced by R. L. Hooker in getting paper title to the apartment house and the land in question in his own name. In equity and good conscience he had no title to this land, and the best that can be said of his alleged interest therein is that he held it as a naked trustee for J. J. Hooker. This being true, it follows that it was not the community property of R. L. Hooker and wife, and the mortgage, therefore, was not invalid because not signed by Frona Hooker.

The fact that J. J. Hooker accepted a deed to these premises providing that the land was subject to this mortgage, and paid taxes on the same, tends to support this theory of the case. As he got exactly what this deed purported to convey, he should not be allowed to use as a defense in an action to foreclose the mortgage, instituted by an innocent mortgagee, the fact that Frona Hooker's signature thereto was forged; thus getting more than the deed purported to convey, viz., the land without this incumbrance, and also depriving the mortgagee of this land as security for the money loaned in good faith. It is not disputed that Frona Hooker signed the deed of these premises to J. J. Hooker subject to this mortgage. By so doing she ratified the same, and by defaulting in this action she impliedly admits the validity of the mortgage. It becomes apparent, therefore, that J. J. Hooker is not entitled to raise the question of the validity of the mortgage, since he would not be injured if the mortgage were declared valid; and the only person who would be injured, viz., Frona Hooker, has ratified and admitted the validity of the same.

To allow appellants to prevail would also violate the well established rule that whenever one of two innocent persons must suffer, he who has enabled a third person to occasion the loss must sustain it. As J. J. Hooker by his lax busi-

ness methods permitted R. L. Hooker to obtain paper title to the premises in question, and by accepting a deed from him ratified such paper title, and by waiting three years and paying interest to respondent during that time misled respondent, he is guilty of laches.

The judgment is affirmed.

MORRIS, PARKER, HOLCOMB, and WEBSTER, JJ., concur.

[No. 13447. *En Banc.* February 16, 1917.]

CEDRIC WHITTLESEY *et al.*, *Respondents*, v. THE CITY OF SEATTLE, *Appellant*.[1]

DEATH—WRONGFUL DEATH—STATUTES—CONSTRUCTION. Rem. Code, § 183 giving a right of action for wrongful death, being in derogation of the common law, is to be strictly construed in determining the persons entitled to sue, but liberally in applying the statute in their favor.

SAME—WRONGFUL DEATH — ACTIONS — PERSONS ENTITLED — STATUTES—CONSTRUCTION. No right of action for wrongful death is given in favor of surviving children for the death of their mother, by Rem. Code, § 183, which provides that the widow or children of a man killed in a duel shall have a right of action therefor; that, when the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action therefor; that, if the deceased leave no widow or issue, then his parents, sisters or minor brothers dependent upon him for support may maintain the action; that, when the death is caused by falling through an opening in any sidewalk etc., his heirs or personal representatives, or if deceased leaves no widow or issue, then his parents, sisters or minor brothers dependent upon him for support, may maintain the action; and this, notwithstanding Id., § 148 providing that in the construction of the code, words importing the masculine gender may be extended to females also; since in each case, the words "man," "person" or "deceased" is used in contradistinction to the word "widow" and other descriptive words indicating an intent to compensate for the loss of the husband upon the theory of dependence upon him for support, without any provision for the death of wife or mother; and since the courts cannot read the word "widower" for "widow."

[1]Reported in 163 Pac. 193.

STATUTES—CONSTRUCTION—ADOPTED LAWS. In adopting the law of another state, changes in wording and phrasing will be presumed to have been made deliberately and with a purpose to limit, qualify, or enlarge the adopted law.

SAME—LEGISLATIVE CONSTRUCTION. A law, reenacted with amendments, after it has received a judicial construction, must be considered as adopting such construction.

DEATH—WRONGFUL DEATH—STATUTES—CODE—ADOPTION. The code of 1881, which includes the wrongful death act rewritten as an independent enactment, having been duly passed as appears from the council and house journals although no mention thereof was made in the session laws of 1881, it cannot be argued that the various subdivisions of the wrongful death act are separate enactments erroneously arranged or combined by the compiler of the code as one act.

Appeal from a judgment of the superior court for King county, Jurey, J., entered December 11, 1915, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for wrongful death. Reversed.

James E. Bradford and *Howard M. Findley*, for appellant.

Beeler & Sullivan, for respondents.

S. A. Keenan, amicus curiae.

CHADWICK, J.—This action was brought by the surviving children of Lillian Bell Whittlesey, who met instant death in an automobile accident occurring in the city of Seattle on the 30th day of March, 1913. The case was tried below upon issues of both law and fact, all of which were decided in favor of respondents. The city has appealed. The contributory negligence of respondents is urged, but finding ourselves compelled to the conclusion that respondents have no right of action, we shall not discuss the facts. Those interested in this phase of the case will find them sufficiently set forth in the opinion filed in the case of *Haynes v. Seattle*, 83 Wash. 51, 145 Pac. 73.

It is conceded that the common law gave no remedy for the wrongful death of a person, and that the action must

be sustained, if sustained at all, under § 183 of the code. Whether a child can recover for the wrongful death of its mother is the concrete question presented for our decision.

Some courts have held the Wrongful Death act, which, in some form, is common to all the states (3 Shearman & Redfield on Negligence, Appendix p. 2051 *et seq.*), to be in derogation of the common law, and therefore, to be construed strictly. Others have held the act to be remedial and have construed it liberally. But, having in mind our own decisions, we agree with Judge Cooley, who suggests the correct rule:

"That such statutes should receive a strict construction in determining the persons or classes of persons who are entitled to their benefit and a liberal construction in applying the statute in their favor." 1 Cooley, Torts (3d ed.), p. 553.

The first territorial legislature passed an act giving a right of action to "the widow, or widow or children, or child or children, if no widow, of a man killed in a duel." The scope of the law was extended, by amendment, in 1875 and in 1909. The act as it now appears (the act of 1854 in Roman lower case type; the act of 1875 in Roman capitals; and the act of 1909 in italics), is as follows:

"§ 183. WHEN SURVIVORS' HEIRS OR REPRESENTATIVES MAY SUE.—The widow, or widow and her children, or child or children if no widow, of a man killed in a duel, shall have a right of action against the person killing him, and against the seconds and all aiders and abettors. WHEN THE DEATH OF A PERSON IS CAUSED BY THE WRONGFUL ACT OR NEGLECT OF ANOTHER, HIS HEIRS OR PERSONAL REPRESENTATIVES MAY MAINTAIN AN ACTION FOR DAMAGES AGAINST THE PERSON CAUSING THE DEATH. *If the deceased leave no widow or issue, then his parents, sisters or minor brothers who may be dependent upon him for support and who are resident within the United States at the time of his death, may maintain said action.* WHEN THE DEATH OF A PERSON IS CAUSED BY AN INJURY RECEIVED IN FALLING THROUGH ANY OPENING OR DEFECTIVE PLACE IN ANY SIDEWALK, STREET, ALLEY, SQUARE OR WHARF, HIS HEIRS OR PERSONAL REPRESENTATIVES, *or if deceased leaves no widow or issue, then his parents, sisters or minor brothers who may be dependent upon him for support, and who are resident within the United States at the time of his death,* MAY MAINTAIN AN

ACTION FOR DAMAGES AGAINST THE PERSON WHOSE DUTY IT WAS, AT THE TIME OF THE INJURY, TO HAVE KEPT IN REPAIR SUCH SIDEWALK OR OTHER PLACE. IN EVERY SUCH ACTION THE JURY MAY GIVE SUCH DAMAGES, AS UNDER ALL CIRCUMSTANCES OF THE CASE MAY TO THEM SEEM JUST. [L. '09, p. 425, § 1; Cf. L. '54, p. 220, § 496; L. '75, p. 4, § 4; Cd. '81, § 8; 2 H. C., § 138.] Rem. Code, § 183.

The object of the statute is well stated in *Hedrick v. Ilwaco R. & Nav. Co.*, 4 Wash. 400, 30 Pac. 714:

"It is settled beyond controversy that, at common law, no civil action could be maintained for damages resulting from the death of a human being. But that defect of the common law has been obviated by statute in the several states analogous to the English statute, commonly known as Lord Campbell's act (9 and 10 Vic. c. 93) though often varying more or less from its provisions, especially as to the party entitled to maintain the action. The object and purpose of these statutes is to provide a remedy whereby the family or relatives of the deceased, who might naturally have expected maintenance or assistance from the deceased, had he lived, may recover compensation from the wrongdoer commensurate with the loss sustained."

The first case bearing on the question now to be decided is that of *Noble v. Seattle*, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822. In that case, the father and mother brought suit to recover for the death of a son, claiming to be "heirs" within the meaning of the statute. The objection that the word "heirs" does not include parents and collateral relatives was successfully urged. The court refused to take the word "heirs" from its setting, saying:

"While in general the term 'heirs' includes collateral kindred and those who take under the statute of distribution, we think that in view of the entire legislation upon the subject it never was intended that parents or remote ancestors might maintain actions like the present, and that the word 'heirs' as used in § 138 should be held to include only those persons who are thereinbefore specifically mentioned, viz.: 'The widow, or widow and her children, or child or children if no widow.' "

The case was directly challenged but was passed as the settled law in *Nesbit v. Northern Pac. R. Co.*, 22 Wash. 698, 61 Pac. 141, and *Copeland v. Seattle*, 33 Wash. 415, 74 Pac. 582, 65 L. R. A. 333. It was suggested in each case that the court, as then constituted, might decide otherwise if it were an original question, but the *Noble* case was adhered to under the doctrine of *stare decisis*.

The next case of interest is that of *Johnson v. Seattle Elec. Co.*, 39 Wash. 211, 81 Pac. 705. It was alleged that Mattie Johnson, the wife of Christian Johnson and mother of Merinus Colmer Johnson, one of the plaintiffs, had met her death by reason of the negligence of the defendant. The surviving husband and children joined in an action to recover damages. The defendant demurred upon two grounds: (1) That several causes of action were improperly joined; (2) that the complaint did not state a cause of action as to Christian Johnson. The trial judge dismissed the action. This court, adhering to the doctrine of the *Noble* case and those following it, held squarely that the right of either husband or wife to sue for the death of the other depended entirely upon legislation, and that a statute giving a right of action that did not theretofore exist would not be extended by construction beyond the class or classes specifically mentioned therein. The court said:

"With the construction already given this statute by this court, it cannot be held that the legislature intended to confer a right of action upon a surviving husband. If it had intended to confer so valuable a right upon a widower in his own behalf, it would doubtless have so said in express terms."

A right of recovery was denied the husband although the merit of the argument, and it was most ably presented in the briefs of the plaintiffs that the loss of a wife to a husband was as great as the loss of a husband to the wife, was not denied. The argument was rejected as a matter for the legislature. In passing upon the right of the child to recover, it was said:

"It is urged that the cause of action in favor of the minor son for the loss of his mother should have been permitted to stand. It was, however, improperly joined with another. This is a statutory ground of demurrer, and the demurrer was properly sustained upon that ground. The order sustaining the demurrer gave leave to amend, so that the son might have separately stated his cause of action. He declined to amend, and there remained nothing for the court to do but render judgment for the respondent."

From this it is insisted that, granting that a surviving husband has no right of action for the death of a wife, the *Johnson* case does not stand as an authority against the right of a child to sue for the death of a mother; and that by the use of the words, "so that *the son might have separately stated his cause of action*," the court actually held that the son had a cause of action. Looking to the face of the opinion and to that alone, this might seem to be so, but a resort to the record and the briefs of counsel convince us that the case decided against the child did not depend alone upon the question of misjoinder. In the beginning, it was the evident purpose of the trial judge and of counsel to submit that question to the court. When the demurrer was sustained, leave was granted to amend. Plaintiffs refused to amend, and the right of the child to maintain the action although the father was dismissed out of the case was contended for by plaintiffs in their briefs. Now it would follow that the dismissal of the father's right of action would not operate as a dismissal of the right of the son to maintain the action if he could in fact state a cause of action. In this we find the only legal reason for the further observation of the court: "He declined to amend, and there remained nothing for the court to do but to render judgment for the respondent." The opinion operates either as a denial of the right by the son to prosecute a separate suit or the question was left open. In either event, the court did not impliedly hold that a child could maintain an action for the death of a mother.

But the reasoning of the court denying a right of action to the father is equally forceful to deny a right to the child; or, as it may be put, a statute granting a right of action will not be extended beyond its terms. The right of action given by statute is: (1) To the widow, widow or children, or child or children of a *man* killed in duel; (2) to his heirs or personal representatives, or if there be no widow, child or children then to dependent parents, sisters and minor brothers; and (3) in case of death caused by an injury in falling through any opening in any sidewalk or street, to the heirs or representatives, or if the deceased leaves no widow etc., then to dependent relatives, etc. In each instance the word "man," "person," or "deceased," is used in contradistinction to the word "widow," and other descriptive words, not only implying, but suggesting, with all the force of apt expression, that the legislature had in mind the word "man," or "male person," or "deceased male person," in the same sense as the word "man" is used in the first enactment ever put upon our statute books—that is, the act of 1854; the central thought of the legislature evidently being that the husband was the support of the family, and that his death would operate to deprive the widow, or widow and children, or child or children, of such support. This theory of dependence upon the husband is further emphasized by reference to the act of 1909, where the right of action is extended to include dependent parents, sisters, and minor children. It seems never to have occurred to the legislature that children might be dependent upon a mother; that a husband might suffer a loss by reason of the death of a wife; or, if it did, the thought was rejected.

Lord Campbell's act, 9 and 10 Vic. c. 93, which, in the language of Judge Cooley, has formed the model for much of the legislation in this country, being passed, as said by this court in *Hedrick v. Ilwaco R. & Nav. Co.*, *supra*, to obviate the defects in the common law, is plain in its terms. It leaves no room for construction. But it is only valuable

to us as a standard for the purpose of comparison and as an aid in finding the legislative intent. And here is to be noted a plain departure from Lord Campbell's act. By § 2 of that act, it is provided that the action "shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been caused," etc. If, then, in drafting our statute, the legislature deliberately omitted the word "husband" from the act, it would seem that it did not intend to extend the benefit to a surviving husband or to anyone other than a widow or children dependent upon, or orphaned by the death of, the father.

It is one of the most ancient, as indeed one of the safest, rules of statutory construction that, where the legislative body adopts the law of another state or country, all changes in words and phrasing will be presumed to have been made deliberately and with a purpose to limit, qualify, or enlarge the adopted law as the change in words and phrases imply. Lewis' Sutherland, Statutory Construction, § 404; 36 Cyc. 1157; *Howells Min. Co. v. Grey*, 148 Ala. 535, 42 South. 448; *Kirman v. Powning*, 25 Nev. 378, 60 Pac. 834, 61 Pac. 1090; *Stutsman County v. Wallace*, 142 U. S. 293.

Counsel strenuously insist that in none of the several decisions of this court have we held that a husband or a surviving child cannot recover for the death of a mother. It is not to these cases that we look for a holding upon the exact question before us. It is rather to find whether the principle of strict construction as to the right of action has been asserted by the court. That the court has shown no tendency to trench upon the prerogative of the legislature —to either include or exclude persons or classes—is manifest in all of our decisions.

The right of action in the case of wrongful death being wholly statutory, the legislature having power to give, or to withhold, within the limits of its discretion, it would seem that the omission of the words widower or surviving husband, and the choice of the descriptive word "widow," would

indicate, as plainly as legislative intent can be indicated, a purpose to give no right of action for the death of a wife and mother. The words "child," "children," "issue," etc., qualify and must be read in connection with the word "man," "person," "deceased," etc.

Our attention is called to the rule of Rem. Code, § 144, which provides that the provisions of the code shall be liberally construed, and of § 148 saying that "words importing the masculine gender may be extended to females also." These rules were resorted to by the court in *Thompson v. Seattle, Renton & S. R. Co.*, 71 Wash. 436, 128 Pac. 1070, to save to a husband a right of action under § 194, or, as it is familiarly referred to, the "Survival Statute."

After the first argument of this case, some of the members of the court (the writer being one of them) were of opinion that there was a disharmony in our decisions, and that the rules referred to might be applied in this case. We have given the question our most serious consideration and have decided that, although the rules relied on were rejected in the *Johnson* case and applied in the *Thompson* case, there is no conflict. They were rightly rejected in the one case and rightly applied in the other.

Following the rule that statutes giving or creating a right of action unknown to the common law will be strictly construed when determining the persons or classes of persons who are entitled to their benefit, and keeping in mind our argument upon the main question, we find no warrant for holding that we have power to declare, by resort to the statutes relied on, that the legislature used the word widow, a word of distinct and well understood meaning in the law, inadvisedly. As is said in the *Johnson* case: "If it [the legislature] had intended to confer so valuable a right upon a widower in his own behalf, it would doubtless have so said in express terms." This must be so, for with Lord Campbell's act before it as a model, the legislature might choose or reject beneficiaries at will.

Section 183 creates the right of action and defines those entitled to its benefits. The words employed are common and all expressive. There is no ambiguity or latent meaning in the act. To extend its terms to meet what we conceive to be a legislative omission deliberately contrived would be to create rather than to construe a statute.

There is a vast difference between the application of the statutory rules referred to in such cases as are referred to in the *Thompson* case and in cases where the statute defines a right that did not exist at common law. In the one case, the rules are invoked in aid of an admitted right. In the other case the rule would operate to create a right that has presumably been rejected by the legislative mind.

Section 194 falls within that class of statutes to which the rules of liberal construction and transposition of terms apply, for no right of action is created by it. It merely recognizes a right of action that existed in a living person whether at common law or in virtue of some statute at the time of the death of the party. The right was in the "person" at the time of death. Such a right is one in kind with a chose in action. The rules may be invoked to preserve an existing right but not to create one. They are, after all, no more than familiar expressions of the first rule of statutory construction; that is, that courts will construe statutes to accomplish the legislative intent. The converse of the rule remains unimpaired; that is, that unless the legislative intent is plain, it will not be enlarged by resort to the rule to the exclusion of the context. This is but another way of saying that the rule of the statute does not allure until the meaning of the act under consideration is gathered from the context of the law. To prepare a law for admeasurement by the §§ 144 and 148, we must first read it in the context, giving words in common use their ordinary meaning, rejecting forced constructions, presuming always that words having a technical or a popular meaning have been used in the sense

in which they are used by those for whose benefit the law was made, and so declaring unless the context shows a different intent.

The spirit of the act is to protect against the loss, by wrongful death, of a husband or father. The words "person," "his," "issue," and "heirs" may be construed to mean the feminine as well as the masculine, but when measured in the context with the word "male" in the first subdivision, and the word "widow" in the two succeeding subdivisions—the words having a technical meaning in the light of the whole statute—the conclusion is compelled that it cannot be held that there is a right of action for the wrongful death of a wife or mother without a positive repudiation of words of equal force, and other rules which are so ancient and so well established as to have the force of positive statute law.

The fallacy of counsel's reasoning may be further illustrated. Let us suppose that our statute provided, as it formerly did, that, upon the death of a husband, an one-third of his estate should be set aside to the widow. It would not be contended seriously that any court would find warrant in such a statute for an order setting over to a surviving husband an one-third of the estate of a deceased wife. Now we have a situation—and it is common to all states—which is the same in principle. Our statute—as do the statutes in all the states—provides for the setting apart of homesteads and exemptions to the widow or widow or minor children. We have searched in vain for one case in which the right of a widower, petitioning in his own right, has ever even raised the question; yet it would seem, if counsel's theory be true, that it would have occurred to some one or to some court to hold that the word "widow," as used in creating and granting homestead and exemption statutes, meant, in law, widower as well. For surely a widower might have the same interest in and the same moral right to protection in the enjoyment of a homestead and exempt property as a widow.

The only case approaching it is that of *In re Murphy's Estate*, 30 Wash. 9, 70 Pac. 109, where it was held that a husband was entitled to claim a statutory homestead after the death of his wife. But the court rested the right not upon a construction of the word "widow," but upon the fact that the surviving husband was the head of a family with minor children to sustain, and that the manifest purpose of the statute was to save a homestead for the use of minor children as well as the widow.

Counsel further insist that the statute will not bear the interpretation put upon it in the several cases cited; that, by the terms of the act, a right of action for the death of a wife or mother is given. To sustain their theory, they submit for our construction a part of that part of the statute which, for convenience, we have numbered (2), "When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death." The several definitions of the word "person" are suggested. That the word person is synonymous with the word individual is not to be denied and, were the words quoted all of the statute, we would have no hesitancy in holding that Mrs. Whittlesey was a "person" within the meaning and intent of the statute; that the word "his" should be read "her"; and that these plaintiffs could maintain the action as "heirs."

Our attention is directed to "similar statutes" in California, Utah, and Minnesota, where the right of action for the death of a wife or mother has been upheld. The difficulty in following counsel lies in the fact that they are following statutes which give a right of action for the death of *any* person, whether male or female, in favor of all persons who may be heirs. Moreover they have selected only a part of our statute, rejecting all that may qualify or limit the part relied on. Decisions from other states cannot be safely relied on. To follow cases holding that a husband is an

"heir" or "next of kin" to the deceased "person" would not aid us in any way, for we find not one statute like, or even "very similar," to our own. We are bound to consider the whole statute, its every word and every part. We must follow the words quoted by the words: "If the deceased leave no widow," etc.

However the act of 1875 might or should have been construed, the act of 1909 operates as a legislative construction of the law. When the legislature undertook to extend a right of action to collateral heirs, it seems to have assumed that the right granted by the statute was in the surviving wife, and not in the surviving husband, for it uses the words: "If there be no widow, or issue then," etc.

Where, as here, the legislature might have, by general terms, given a right of action to the surviving spouse, but, instead of doing so, selected from two possible classes, that is, widows and widowers, one class, *eo nomine*, it would seem to be no less than an assumption of superior judgment for courts to hold that it did not mean just what it said. The words: "If the deceased leaves no widow or issue," are not words of grant. Their only purpose is to qualify and explain the words of grant in the next preceding sentence.

A widow is a woman who has lost her husband by death and who has not married again. A widow is as distinct in law and in common understanding as an unmarried person, a wife, a husband, a widower, a master or a servant. No cases have been called to our attention, and we have found none, where the word widow has been held to mean anything else than a woman surviving the death of her husband. The courts have habitually refused to read the word "widower" for "widow." *Johnson v. Seattle Elec. Co., supra; Western Union Tel. Co. v. McGill*, 57 Fed. 699, 21 L. R. A. 818; *Duerber v. Northern Pac. R. Co.*, 100 Fed. 424.

"The wife upon the death of the husband becomes the head of the family, and the duty that had previously rested upon the husband to provide a support for her and children

falls upon her; but the deprivation to her and them by the death of the husband and father of the protection and support which he, as head of the family, had been wont to provide them, and the presumed inexperience and consequent inability to perform as he had done the duties of which while living he had relieved her, doubtless gave occasion for the special provision made by the statute for her as widow, or in case of her not surviving the husband, for his child or children. . . .

"Whether the legislature acted wisely in excluding the husband and children of the intestate wife from the benefits conferred by subsection 5, section 1403, Ky. Stats., 1903, is a matter we are not called upon to determine. The proper construction of the statute is all that concerns us, and we think its language allows of no other meaning than that we have given it." *Thaxton's Guardian v. Walters' Adm'r*, 130 Ky. 235, 113 S. W. 118.

The legislative intent is further evidenced by the fact that, at the time the law was reenacted with amendments in 1909, the legislature had before it the opinion of this court in the *Johnson* case. It was evidently content with that decision, and having passed the statute in so far as it was affected by the decision of the court in the *Johnson* case without amendment, we must conclude that it was, at that time, satisfied with the construction put upon the act, and that it took that means of "giving legislative sanction to our ruling." *State v. Gustafson*, 87 Wash. 613, 152 Pac. 335.

The same situation in which we find ourselves confronted the courts in New York. Under a statute providing for an action for the "exclusive benefit of the widow and next of kin," it was held that:

"It is the pecuniary injury resulting to the wife and next of kin which is to be estimated; but the injury to the husband, when it is the wife whose death has been caused by the defendant's act, is not spoken of as a ground of damages. And the husband is not embraced within the description of next of kin of his wife. Husband and wife, as such, are not of kin to each other in a legal sense, and the husband

cannot take under a settlement limited to the next of kin of his wife. . . .

"The action is a peculiar one, depending entirely upon the statute, and it seems to us quite clear that a compensation for the husband's loss of service cannot be embraced in the damages." *Dickins v. New York Cent. R. Co.*, 23 N. Y. 158.

A like holding was made in *Green v. Hudson River R. Co.*, 32 Barb. 25. The omission was afterwards cured by statute so that "the executor or administrator of a decedent, who has left him, or her surviving, a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, . . ." Gilbert's Annotated Codes, § 1902.

It may be noted in passing that, under statutes giving a right of action to heirs or next of kin or other like expressions, a husband has sometimes been held to be a next of kin. It is upon these cases that counsel most rely. In such cases, the courts have resorted to the statutes of distribution to determine the meaning of the words "next of kin" rather than to the common law definition of the term. But in none of the statutes considered is the word widow, wife, widower, or husband used.

A very scholarly brief has been filed by Mr. S. A. Keenan as *amicus curiae*. With one exception, it has been sufficiently answered. It is urged that the first subdivision of § 183 is confined entirely to damages recoverable for the loss of a husband and father in a duel. It is granted that, by the terms of that subdivision, only the widow, or widow and child or children, can recover. He reasons that the first subdivision should not be considered by the court in construing subsequent subdivisions. He follows the history of the several acts, and undertakes to show that subdivision 1 and subdivisions 2 and 3 are separate enactments; that the act of 1875 was, by apt words, added as a "new section" to follow § 8 of the code of procedure as it was then numbered—§ 8

being the first subdivision of our present § 183. He challenges the decisions of the court, saying:

"Without recourse to the duelling statute enacted in 1854, the court could not have limited the term 'heirs' to 'widow' and 'children';"

and charges that we should reject the first subdivision, and confine our inquiry, for the purposes of construction, to the second and third subdivisions only. He says:

"By mere accident the Act of 1875 (substantially the 2d and 3d parts of our present section 183) was put under the same section number by the compiler of the statute in 1881. The intent of the law must be traced to the acts of the legislature, and not to the *arrangement* of the law by a *compiler*."

The error in this reasoning lies in the fact that whatever may have been the history of the prior enactments, § 183, as it appeared in Hill's Code, § 138; in the Code of 1881, § 8; and in Rem. & Bal. Code, § 183—that is to say, prior to the amendment of 1909—was an independent enactment. It was passed by the legislature of 1881. The code of procedure, revised and rearranged, was introduced as Council Bill No. 66; passed the council and the house and was approved by the governor. The penal code and probate practice act were adopted in the same way.

"It was, therefore, a valid law, even if the person who prepared the bill was not authorized to prepare it. . . .

"That the act of 1881 under consideration is a new and independent act complete within itself is evidenced by the section next to the last, as follows:

" 'Sec. 1295. No statute, law or rule is continued in force because it is consistent with the provisions of this code on the same subject; but in all cases provided for by this code all statutes, laws, and rules heretofore in force in this territory, whether consistent or not, with the provisions of this code, unless expressly continued in force by it, are repealed and abrogated.' Code of 1881, § 1295." *In re Donnellan*, 49 Wash. 460, 95 Pac. 1085.

It is unfortunate that the Session Laws of 1881 make no mention of the three acts by which the code of civil procedure,

the probate practice act, and the penal code were adopted. The legislature provided at that session for the publication and distribution of the new code. It must have believed that the publication of the laws in the form of a code as soon after the adjournment of the legislature as it might be conveniently done, would be a sufficient publication without duplicating that work in the session laws. Both the courts and lawyers have been misled, when searching for the history of our laws, by the Session Laws of 1881; but resort to the journals of the legislature and to the enrolled bills on file in the office of the secretary of state leaves no doubt that § 183 was adopted by the legislature as a new enactment. But if these things were not true, it would not follow that the first subdivision of § 183 is a separate law. Section 183, as it is now written, was reenacted, including the first subdivision, by the act of 1909, Laws 1909, p. 425.

We feel that it is not out of place to suggest to the legislative body that § 183 should be rewritten so that it will be more in harmony with the statutes of almost every other state in the Union, and be available to all of those who ought, in justice, to come within its beneficent purposes.

Reversed and remanded with directions to dismiss.

All concur.

[No. 13571. Department Two. February 16, 1917.]

G. W. MOGELBERG, *Respondent*, v. C. E. CALHOUN *et al.*, *Appellants*, CHARLES GASSAR, *Defendant and Respondent*.[1]

APPEAL—BOND—NECESSITY—NEW BOND—STATUTES. An appeal bond given by certain defendants in favor of the plaintiffs, is insufficient to support their appeal from a separate judgment in favor of codefendants upon a cross-complaint, tried out without objection in the main case, in view of Rem. Code, § 1721, requiring an appeal bond "to the adverse party;" hence Rem. Code, § 1730-9, providing for the curing of defects in an appeal bond by the giving of a new bond is ineffectual to save the appeal as to the codefendant, since the latter act has no application where no appeal bond whatever has been given (FULLERTON, J., dissents).

SAME—APPEAL BOND—ADVERSE PARTY—SEPARATE JUDGMENTS. A codefendant who was exonerated from plaintiffs' cause of action, and who obtained a separate verdict and judgment against the other defendants upon a cross-complaint constituting a separate cause of action, is not an "adverse party" to an appeal by his codefendants from the judgment against them in favor of the plaintiffs, where the verdicts and judgments entered were separate and distinct, although appearing of record under one journal entry.

SAME—NOTICE—ABANDONMENT—SECOND NOTICE. A second notice of appeal which was never perfected by the giving of a bond and which recited that it was without waiving the former notice, does not constitute an abandonment of the original appeal.

SAME—RECORD—STATEMENT OF FACTS. It is not necessary to serve a statement of facts on a coparty who was not a necessary party to the appeal.

TRIAL—LIMITING NUMBER OF WITNESSES—DISCRETION. In an action for personal injuries, it is an abuse of discretion to limit the number of eyewitnesses to the accident to six, after the defendant had examined five witnesses, where they had viewed the accident from different angles and different distances and did not agree in all respects and their testimony was not confined to a single fact, and the defendant had other eyewitnesses to the accident present in court and ready to testify.

SAME—OFFER OF PROOF—SUFFICIENCY. An offer of proof need not be specific where it was assumed that it would be competent, relevant and material and it was erroneously excluded on other grounds.

[1]Reported in 163 Pac. 29.

HUSBAND AND WIFE—COMMUNITY DEBT. In an action against husband and wife for the negligence of the husband in driving an automobile for hire for the benefit of the community, a judgment against husband and wife "and each of them" is erroneous as being against her separate estate and should be confined to her community interest.

Appeals from judgments of the superior court for King county, Frater, J., entered January 18, 1916, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger in an automobile, and upon a verdict in favor of defendant Gassar upon a cross-complaint, after a trial on the merits. Appeal dismissed as to defendant Gassar; reversed as to plaintiff.

Geo. McKay and *Henry S. Noon*, for appellants.

Beechler & Batchelor (*Arthur C. Bannon*, of counsel), for respondent Mogelberg.

Byers & Byers, for respondent Gassar.

PARKER, J. — The plaintiff, Mogelberg, commenced this action in the superior court for King county, seeking recovery of damages for personal injuries which he alleged resulted to him from the negligence of the defendants, Calhoun and Gassar, in the driving of their respective automobiles and causing them to come into collision at the intersection of Twentieth avenue and Union street, in Seattle, while he was a passenger for hire upon defendant Calhoun's automobile. Mrs. Calhoun was made a defendant evidently because of her alleged community interest in the operation of the automobile which was being driven by her husband as a carrier of passengers for hire. The Pacific Coast Casualty Company was made a defendant because it had executed a bond as security, with the defendant Calhoun as principal, in compliance with chapter 57, Laws of 1915, p. 227 (Rem. Code, § 5562-37 *et seq.*), relating to motor vehicles as passenger carriers in cities of the first class. The trial resulted

in verdict and judgment in favor of plaintiff Mogelberg, awarding him $2,500 against the defendants Calhoun and wife and the Casualty Company, from which they have appealed to this court. Defendant Gassar was exonerated from all liability to plaintiff Mogelberg, and there was also rendered in defendant Gassar's favor verdict and judgment upon a cross-complaint for damages filed against him in this action by his codefendant Calhoun. The issue so raised was tried together with the issue upon plaintiff Mogelberg's claim for damages against all the defendants, without objection. The defendants Calhoun and wife gave notice of appeal from this judgment in favor of Gassar.

Counsel for defendant Gassar moved to dismiss the appeal attempted to be taken from the judgment rendered in his favor upon the ground that it never was perfected by the filing of a bond as required by Rem. Code, § 1721. The only bond ever filed in the cause is one executed by defendants Calhoun and wife and the Casualty Company as principals with a surety, for the benefit of plaintiff Mogelberg, defendant Gassar not being mentioned or referred to therein in any manner as beneficiary. This bond plainly was intended only to perfect the appeal of defendants Calhoun and wife and the Casualty Company from the judgment rendered against them in favor of plaintiff Mogelberg. This judgment, as we shall presently see, is a separate judgment from that rendered in favor of defendant Gassar upon the cross-complaint of his codefendant Calhoun. But even if this were not so, the bond would seem ineffectual to perfect an appeal as against defendant Gassar, it not being given for his benefit by naming him as a beneficiary therein. Rem. Code, § 1721, provides that:

"An appeal in a civil action or proceeding shall become ineffectual for any purpose unless at or before the time when the notice of appeal is given or served, or within five days thereafter, an appeal bond to the adverse party conditioned for the payment of costs and damages as prescribed in section 1722, be filed with the clerk of the superior court, or

money in the sum of two hundred dollars be deposited with the clerk in lieu thereof. . . ."

This provision has been given full force and effect by this court. *Bruhn v. Steffins*, 66 Wash. 144, 119 Pac. 29; *Heine v. Hall*, 84 Wash. 260, 146 Pac. 577. We conclude, therefore, that the appeal attempted to be taken from the judgment rendered in favor of Gassar as against his codefendant Calhoun should be dismissed. We have not overlooked the act of 1915 (Laws 1915, p. 303, § 9) relating to the curing of defects in appeal bonds reading as follows:

"When a notice of appeal to the supreme court shall have been served and filed in due time and an appeal bond shall have been given within the time required by law, no appeal shall be dismissed because of any defect in the appeal bond, nor because an appeal bond which is given both as a cost bond and as a bond on supersedeas shall be insufficient by reason of the amount, but the appellant shall in all cases be allowed to give a new bond within such time and upon such terms as the court may order." Rem. Code, § 1730-9.

It seems quite plain to us that this provision has no reference to cases where no bond whatever has been filed as in this case. In so far as the judgment rendered in defendant Gassar's favor upon the cross-complaint of his codefendant Calhoun is concerned, there never was any bond, defective or otherwise, given to perfect that appeal and therefore none to cure by the giving of a new bond. The appeal from the judgment rendered in defendant Gassar's favor upon the cross-complaint of his codefendant Calhoun is dismissed.

Counsel for plaintiff, Mogelberg, move to dismiss the appeal taken by defendants Calhoun and wife and the Casualty Company from the judgment rendered in his favor against them upon the ground that no appeal bond has been executed and filed by them as required by Rem. Code, § 1721. It is argued that defendant Gassar is an adverse party in the cause, and that, therefore, the appeal bond above mentioned given by defendants Calhoun and wife and the Casualty

appeal from the judgment rendered in Mogelberg's favor against defendants Calhoun and wife and the Casualty Company. On the same day, the appeal bond above mentioned was executed by Calhoun and wife and the Casualty Company with a surety, which bond was sufficient in substance and form to perfect that appeal. It manifestly was intended to perfect that appeal and no other. That notice of appeal was not addressed to Gassar nor was it served upon him, nor did that bond name or in any manner refer to Gassar as beneficiary therein. It seems to us that, in the light of the separateness of these controversies and the separate verdicts and judgments rendered determining them, it is manifest that the rights of Gassar will be wholly unaffected by either the affirmance or the reversal of the judgment rendered in favor of plaintiff Mogelberg and against defendants Calhoun and wife and the Casualty Company. Gassar, therefore, is not an adverse party in the case in so far as the rights of any of the parties here involved are concerned. We find Gassar here in substantially the same situation as the defendant Dimmock was in in the case of *Sipes v. Puget Sound Elec. R. Co.*, 50 Wash. 585, 97 Pac. 723. In that case, Dimmock and the railway company were sued for damages, the trial resulting in a verdict against the railway company and exonerating Dimmock. Dimmock, therefore, of course, had no occasion to and could not appeal. In holding that it was not necessary upon the appeal by the railway company to serve Dimmock with notice of the appeal, Judge Crow, speaking for the court, observed:

"Dimmock was a successful litigant. There was no order from which he could appeal, and we fail to understand how the neglect to serve him with appellant's notice deprived any party of benefits to be derived from the appeal, or prevented the respondent from perfecting an appeal in his own behalf against the defendant Dimmock. While it is true that § 6504 [Rem. Code, § 1720] directs that service be made upon all parties who have appeared, it is apparent that the sole purpose of such notice to appearing parties, other than the pre-

vailing one mentioned in § 6503 [Rem. Code, § 1719], was that in the event of their having an interest in the appeal, they might join therein, if they so desired. In other words, the object of the statute was to require all interested parties to jointly prosecute their appeals and cross-appeals instead of bringing them to this court by piecemeal. . . .

"The condition of the record before us shows that the failure of the appellant to serve its notice of appeal upon Dimmock does not go to the substance of the appeal, nor to the right of appeal. Dimmock was satisfied with the judgment in his favor. Not being an aggrieved party, he could not appeal. Failure to serve him deprived him of no rights, neither did it prevent the respondent Sipes from appealing as against Dimmock, either by original or cross-appeal. How, then, would the presence of Dimmock aid this court in disposing of the issues arising on this appeal between the respondent Sipes and the appellant, the Puget Sound Electric Railway Company, or how could his absence interfere with a complete administration of justice as between them? Evidently the failure to serve him does not, on the record now before us, create any jurisdictional defect in the appeal of the Puget Sound Electric Company for which it should be dismissed."

Judge Rudkin, in a special concurring opinion, in that case also observed:

"The legislature never contemplated the service of a notice of appeal on parties who could not appeal or join in an appeal, and whose rights could in no manner be affected by any action the appellate court might take. We have so held in effect where parties appeared to disclaim, or were dismissed by consent, or where their claims were satisfied. *Doyle v. McLeod*, 4 Wash. 732, 31 Pac. 96; *McEachern v. Brackett*, 8 Wash. 652, 36 Pac. 690, 40 Am. St. 922; *Watson v. Sawyer*, 12 Wash. 35, 40 Pac. 413, 41 Pac. 43; *First Nat. Bank of Seattle v. Gordon Hardware Co.*, 30 Wash. 127, 70 Pac. 251; *Smalley v. Laugenour*, 30 Wash. 307, 70 Pac. 786; *Sheehan v. Bailey Building Co.*, 42 Wash. 535, 85 Pac. 44."

It is true, that decision dealt with the question of the necessity of serving notice of appeal upon Dimmock, while this has to do with the question of the necessity of making

defendant Gassar a beneficiary in the appeal bond. Manifestly, if it was unnecessary to serve notice of appeal upon Dimmock in the *Sipes* case because he was not an adverse party, it was unnecessary for Calhoun and wife and the Casualty Company to name their codefendant Gassar a beneficiary in their appeal bond in this case, since Gassar was in this case no more an adverse party than Dimmock was in the *Sipes* case, so far as his appealing codefendants are concerned. This conclusion also finds support in *Seattle Trust Co. v. Pitner*, 17 Wash. 365, 49 Pac. 505, and *Woelflen v. Lewiston-Clarkston Co.*, 49 Wash. 405, 95 Pac. 493; *Soderberg v. McRae*, 67 Wash. 104, 120 Pac. 878; *Carstens & Earles v. Seattle*, 84 Wash. 88, 146 Pac. 381.

Sometime after the giving of the notice of appeal last above noticed, but within the time prescribed by law, counsel for defendants Calhoun and wife and the Casualty Company served another notice of appeal upon counsel for both plaintiff Mogelberg and defendant Gassar. No bond was ever given looking to the perfection of this appeal, and it therefore, of course, became ineffectual. It is argued that this was in effect an abandonment of the first appeal which had been perfected by the giving of the appeal bond, counsel relying upon that line of decisions which permits an appellant to abandon his appeal and give a new notice of appeal at any time within the statutory prescribed time for the taking of an appeal. See *Carstens & Earles v. Seattle*, 84 Wash. 88, 93, 146 Pac. 381, and cases cited.

Looking to this notice of appeal, we find therein these words, "without waiving their notice of appeal heretofore given herein." We are of the opinion, in view of the perfection of their first appeal and this reservation of their rights thereunder, that this new notice should not be construed as an abandonment of the first appeal. Just what the purpose was in giving this second appeal notice is not very clear. Evidently, however, it was because of some misgiving on the part of counsel as to the sufficiency of the first

appeal, and possibly with a view of giving a bond naming Gassar as well as Mogelberg beneficiary therein. This, however, counsel evidently concluded was unnecessary and abandoned the idea of perfecting this second appeal by the giving of a bond. The motion to dismiss the appeal of defendants Calhoun and wife and the Casualty Company is denied.

Counsel for Mogelberg move to strike the statement of facts from the record because it was not served upon Gassar before being settled by the trial court. It seems to us that what we have said touching the question of the necessity of the bond given upon this appeal being for the benefit of defendant Gassar and the necessity of his being named therein as a beneficiary, disposes of this contention. Since it was not necessary to serve Gassar with the notice of appeal given by Calhoun and wife and the Casualty Company, or to name him as a beneficiary in the bond given in the perfection of that appeal, it was not necessary to serve him with a statement of facts or with notice of the filing thereof. The decision of this court in *Woelflen v. Lewiston-Clarkston Co.*, 49 Wash. 405, 95 Pac. 493, seems to so hold. We conclude that the motion to strike the statement of facts must be denied. It is so ordered.

It is contended in appellants' behalf that the trial court erred in its refusal to allow more than six witnesses who were eyewitnesses to the accident to testify in appellants' behalf. After Mr. Horner, then of counsel for appellants, had put upon the witness stand and examined five witnesses who had seen the accident and testified as to how it happened as they viewed it, the following occurred:

"Mr. Horner: I will call Mr. LeBeau.

"The Court: This will be the last witness on that line. I am going to call attention to that now because you have had at least six, and that is the limit of cumulative evidence. I cannot sit here and listen to an unlimited number of people testifying to the same facts. You have had at least six, I think, if not seven.

"Mr. Horner: We have three more, two more besides him.

"The Court: This will be the last witness. You cannot put on any more that will testify to the same facts, simply witnesses to the accident."

Mr. LeBeau was then sworn and examined, giving his version, he being an eyewitness to the accident. Thereafter, the following occurred:

"Mr. Horner: We now offer the testimony of James Bayard, who is in the court room, of 1010 Howell street, Seattle, who was an eyewitness to the accident on September 14, 1915, at Twentieth avenue and East Union street, in Seattle.

"We also offer the testimony of Mrs. W. J. Simons, Riverside avenue, Seattle, Washington, who was an eyewitness to the accident at Twentieth avenue and East Union street on September 14, 1915, between Mr. Calhoun and Mr. Gassar.

"Mr. McKay: Now, your Honor, before ruling on this, it is only fair to say this, that these men who are eyewitnesses see the accident from different angles and different positions and see different features of the accident. It cannot be said that each witness is repeating the testimony of any other witness. Now, your Honor has seen the witnesses brought on here and no two of them have seen it exactly alike. They see it from different angles and they see it from different viewpoints and it is not fair to say they are testifying to the same state of facts, and that they are merely cumulative witnesses. They are witnesses who have seen the matter from different points and from different angles. Now, as I understand, these two witnesses were not in the jitney. They were going down the hill and were not driving in the machine and they were in such a position that they would see the matter in a different angle, entirely different from what the other parties have seen it, and their testimony will not be identical with the other witnesses but seen from a different angle in a different position.

"The Court: The court will adhere to the rule. . . . At least seven different witnesses have testified to seven different angles and seven different points of view. . . . The court will not permit any time to be taken up with any more witnesses on the one point. . . .

"The Court: You may note an exception."

The several witnesses who had seen the accident and testified in appellants' behalf viewed it for the most part from different angles and from different distances. While they did not disagree in their different versions of how it occurred to any great extent, they did not agree in all respects. Their testimony was not confined to a single fact, but each stated a number of detailed facts bearing upon the main issue in the case, to wit, Calhoun's and Gassar's negligence. This was not opinion or expert testimony upon some single question, nor was it even testimony of eyewitnesses relating to some single question, except as the testimony of the several witnesses had a bearing upon the main question of the defendants Calhoun and Gassar's negligence. The decisions seem not wholly in harmony upon the question of the extent of a trial court's power to limit the number of witnesses a party may examine and have testify in his behalf on some single question; but no decision has come to our notice which we regard as supporting the view that a trial court has the power to limit the number of eyewitnesses which a party may have testify in his behalf, as the trial court ruled in this case. This question similarly arising was learnedly reviewed at length by the supreme court of Missouri in *St. Louis, M. & S. E. R. Co. v. Aubuchon*, 199 Mo. 352, 97 S. W. 867, 116 Am. St. 499, 9 L. R. A. (N. S.) 426. In that case, the trial court limited the number of witnesses to four upon each side upon the question of damages in an eminent domain case, the limitation apparently being, as in this case, not as to the number of witnesses who might express opinions as to the amount of damages, but the number of witnesses who would be permitted to testify touching the question of damages, manifestly including those who might describe the situation as well as those who might give opinion testimony. In holding that the trial court in that case abused its power in so limiting the number of witnesses, Judge Lamm, speaking for the court, said:

"Plaintiff assigns error in the exclusion of testimony—the point arising *nisi*, in this way: Having introduced three witnesses on the question of damages, the trial court, during the examination of the third witness on behalf of plaintiff, announced a rule to the effect that each side would be allowed only four witnesses on that issue, and applying the rule to the then condition of plaintiff's proof, allowed only one other witness to plaintiff on that issue. Plaintiff tendered other witnesses on that issue, but they were excluded. . . .

"On collateral and incidental issues, as for example the general reputation of a witness, or an issue upon a motion for a change of venue, or for costs, etc., it is a wise and a settled rule to allow trial courts wide discretion; and error predicated upon the exercise of such discretion should be palpable and manifest to be held prejudicial.

"Nor will we lay down any hard-and-fast rule circumscribing the power of trial courts, in the economy of time and dispatch of business, to put some reasonable bounds on the introduction of witnesses on a main issue in a civil suit; especially so where the evidence on a single point is not controverted, or where it is distinctly cumulative in quantity and quality. But evidently the matter should be approached with caution and an arbitrary rule allowing four witnesses to a side in a damage suit upon the issue of damage or no damage cannot be defended. Much less can it be defended when the rule is made and applied (as here) after three witnesses have been placed upon the stand by one party. Picking and choosing become a vital matter under such rule, and even-handed justice requires that both parties have fair forewarning and the full privilege to pick and choose. This privilege was denied plaintiff and thereby defendant had a distinct advantage; because, after the rule, plaintiff had but one choice, while defendant had four.

"But, on principle, the rule was arbitrary and, we think, unreasonable. Defendant's damage might be composed of many elements, and one witness might be qualified on one element and another witness on another. . . .

"The jury are the sole and exclusive judges of the weight of the testimony; with that the trial court has nothing to do during the trial. If, then, the trial judge may, without any cause shown, project his will arbitrarily into the num-

ber of witnesses on the crucial point in the case, he may by that token entirely foreclose the weight of evidence, and thus indirectly do what he may not directly do, to-wit, interfere in a realm where the jury reign supreme; and while we would not want to say that a trial judge must supinely and indefinitely sit with folded arms to hear a cloud of witnesses spin out evidence upon the same point, yet there was no such threatened abuse in this case, and the precedent established by the learned judge, *nisi*, ought not be be sustained.

"There may be conflict in the authorities, but the weight of judicial opinion and the quality of reasoning advanced therefor lie with the view herein expressed: (*Railroad v. Matula*, 79 Tex. 577; *Nelson v. Wallace*, 57 Mo. App. 397; *Markham v. Herrick*, 82 Mo. App. 327; *White v. Hermann*, 51 Ill. 243; *Green v. Ins. Co.*, 134 Ill. 310; *Village of South Danville v. Jacobs*, 42 Ill. App. 533; *Crane Co. v. Stammers*, 83 Ill. App. 329; *Cooke Brewing Co. v. Ryan*, 98 Ill. App. 446; *Barhyte v. Summers*, 68 Mich. 341; *Ward v. Dick*, 45 Conn. 235; *Perkins v. Rice*, 187 Mass. 28)."

In that case, as in this one, the trial court limited the number of witnesses so as to permit only one witness to be examined after announcing the rule. This fact lends additional support to the contention of counsel for appellants in this case, though we are inclined to the view that their contention would be well founded in the absence of this fact.

In *Johnsen v. Johnsen*, 78 Wash. 423, 139 Pac. 189, 1200, Judge Gose, speaking for the court, made this observation:

"While the trial court may and should exercise a discretion as to the number of witnesses that may be called in a case, or upon a particular issue in a given case, this discretion does not clothe the court with the arbitrary power to deny a litigant the right to offer testimony which reasonably tends to support his theory of the case or to disprove the theory of his adversary."

The latter portion of these remarks lends support to the contention of counsel for appellants though it may be that the first portion thereof furnishes some ground for the contention made in respondent's behalf. That seems not, how-

ever, to have been a controlling question on the appeal, and we think the first portion of the learned judge's remarks suggest too broad a rule except possibly as applicable to very extreme cases. Indeed, the remarks seem to have been made only as a general observation by way of argument rather than as an opinion as to what the limit of the rule might be. In *Swope v. Seattle*, 36 Wash. 113, 78 Pac. 607, there was involved the question of limiting the number of expert or opinion witnesses as to the value of real property, where it was held that the trial court in its discretion might do so. That, however, is quite a different question from the one here involved.

It is contended in respondents' behalf that the error, if committed by the trial court in limiting the number of witnesses, is not reviewable here because there was no sufficient offer of proof made by counsel for respondent as to what the two additional witnesses would testify to. In support of this contention, we are cited to the decisions of this court in *Norman v. Hopper*, 38 Wash. 415, 80 Pac. 551; *Chlopeck v. Chlopeck*, 47 Wash. 256, 91 Pac. 966, and *Hightower v. Union Savings & Trust Co.*, 88 Wash. 179, 152 Pac. 1015. We think the holding in all of these cases can be differentiated from the question here presented. In the *Norman* case, a witness was upon the stand and was interrogated as to negotiations leading up to the making of the agreement in question and was not permitted to answer upon objection of opposing counsel. The court held that the claimed error was not reviewable because the record did not show "that the answer would be material" and the record did not inform this court what counsel expected to prove. In the *Chlopeck* case, a witness was upon the stand being interrogated and was not permitted to answer certain questions propounded to him which questions did not upon their face disclose the materiality of the answers sought, nor was it stated by counsel what he expected to prove by such answers. It was there

also held that this court was unable to determine whether or not the trial court erroneously excluded the answers. In the *Hightower* case, a witness was upon the stand being interrogated when he was asked to state conversations had between himself and the president of the defendant. He declined to testify upon the ground that the conversation was privileged since it was made to him in his capacity as attorney for the defendant. Again this court ruled that, assuming the conversations were not privileged, it was unable to tell whether or not the court erred in excluding the evidence because it was not stated what those conversations were so as to show their materiality. We think none of these cases are controlling here. None of them involved the limiting of the number of witnesses a party might produce.

While it was not stated just what the two excluded witnesses would testify to in giving their versions of how the accident here in question happened, it was stated that they were eyewitnesses to the accident, viewing it from different angles than it was viewed by other witnesses. The remarks of the learned trial judge renders it plain that he assumed, as counsel did, that the testimony of these witnesses would be competent, relevant and material to the main issue of defendants Calhoun and Gassar's negligence. In other words, it clearly appears that the evidence was not excluded because it was incompetent, irrelevant or immaterial, but solely because of the ruling of the court limiting the number of eyewitnesses to the accident which might be produced and examined in behalf of appellants. We are constrained to hold that the trial court erroneously excluded the testimony of these witnesses. The law furnishes the presumption that this was to appellants' prejudice.

Contention is made in appellants' behalf touching the court's giving and refusing to give requested instructions to the jury. The substance of counsel's complaint in this behalf is that the instructions as given were confusing, due to

the trial of the issue of damages arising upon respondent Mogelberg's claim against all the defendants with the issue of defendant Calhoun's claim of damage against Gassar, in that the court did not, in its instructions, distinguish, with sufficient clearness to the jury, between these two controversies. The requested instructions which were refused, it is insisted, would have made this matter clear to the jury. Whatever error there may have been in this regard cannot occur upon a new trial, in view of the fact that the controversy between Calhoun and Gassar is no longer an open one. We therefore deem it unnecessary to notice this contention.

Another contention made in behalf of appellant Mrs. Calhoun seems to call for notice here, in view of our conclusion that appellants are entitled to a new trial, to the end that it be not repeated upon the entry of any judgment which may be rendered in respondent's favor upon a new trial. Both the allegations of respondent Mogelberg's complaint and the evidence given upon the trial renders it plain that whatever liability Mrs. Calhoun incurred by reason of her husband's negligence was only against her as a member of the community consisting of herself and defendant C. E. Calhoun, her husband. The judgment rendered against her, read literally, seems to render her separately liable since it reads "that plaintiff have judgment against C. E. Calhoun and Mary I. Calhoun, his wife, and Pacific Coast Casualty Company, a corporation, *and each of them.*" Looking to the record as a whole, we are inclined to believe that this was more a matter of oversight on the part of the clerk entering the judgment than a deliberate act of the court. We notice this error in the judgment to the end that it may be avoided at the conclusion of another trial should verdict and judgment go against appellants and the showing be no different touching Mrs. Calhoun's community and separate interests than appears in this record.

We conclude that appellants Calhoun and wife and the Casualty Company are entitled to a new trial as against

plaintiff Mogelberg. It is so ordered and the cause is remanded to the trial court for further proceedings not inconsistent with the views herein expressed.

MORRIS, MOUNT, and HOLCOMB, JJ., concur.

FULLERTON, J. (concurring)—I am unable to concur in the foregoing opinion in so far as it orders a dismissal of the appeal as to defendant Gassar. The appellants served upon Gassar and filed, in due time, a notice of appeal, and entered into a bond which they thought perfected their appeal to this court. In answer to the motion to dismiss, they have asked to be permitted to perfect the bond upon such terms as the court may impose, if the bond is deemed insufficient. The request the majority denies, because it considers the bond given in effect no bond since defendant Gassar is not named therein, and this although it is conceded apparently that the appellants would be allowed to perfect the bond had Gassar been so named, however defective the bond might otherwise be. In my opinion, the rule applied is not only harsh and technical, but contrary to both the letter and the spirit of the section of the statute of 1915 quoted in the opinion (Rem. Code, § 1730-9).

On the merits of the controversy, I concur with the majority.

[No. 13576. Department Two. February 16, 1917.]

J. F. BERTLES, *Respondent*, v. HAWKINS MOTOR CAR COMPANY, *Appellant*.[1]

APPEAL—RIGHT TO APPEAL—JURISDICTION—AMOUNT IN CONTROVERSY. Under Const., art. 4, § 4, limiting the appellate jurisdiction of the supreme court in civil actions at law for the recovery of money to cases in which the original amount in controversy exceeds two hundred dollars, no appeal lies from a judgment in an action brought in justice court for $99.99 in which the defendant counterclaimed for a like sum, although, on appeal to the superior court, the defendant was allowed to amend his answer to claim $293; since the jurisdiction of the justice was limited by Rem. Code, § 44, to $100, and damages in excess thereof were waived by the parties by bringing action in the justice court; and the amendment did not change the "original amount in controversy."

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 3, 1916, in favor of the plaintiff, notwithstanding the verdict of a jury of no damages to either party, in an action for damages resulting from an automobile collision. Appeal dismissed.

Cullen, Lee & Matthews, for appellant.

Samuel R. Stern, for respondent.

MOUNT, J.—On October 24, 1913, two automobiles collided upon the streets of Spokane. One of the automobiles belonged to the respondent. The other was driven by an agent of the appellant. Both automobiles were damaged. The appellant now claims that its automobile was damaged to the extent of $293. The respondent brought an action in the justice court to recover from the appellant for damages which were alleged in the complaint to be $99.99, to respondent's automobile. The appellant appeared in the justice court, filed an answer, and counterclaimed for damages to its machine in the sum of $99.99. The case was tried to the justice of the peace, who found in favor of the plaintiff

[1]Reported in 163 Pac. 3.

in that action for the full amount claimed. The defendant there appealed from the justice to the superior court, where trial was had to a jury. Upon that trial, a verdict was returned in favor of the defendant for one dollar. Thereafter, a new trial was granted, and, by leave of the superior court, an amended answer was filed by the defendant, claiming the full amount of its damage at $293. Thereafter, a new trial was had to a jury, and a verdict was returned in favor of the plaintiff for $50. Thereafter, motions were made for judgment notwithstanding the verdict and for a new trial. The motions for judgment notwithstanding the verdict were denied, but a new trial was granted. The case was again tried in the superior court to a jury, and resulted in a verdict of no damages for either party, and with the request from the jury that the costs be divided. Thereafter, motion for judgment in favor of plaintiff notwithstanding the verdict was made. The court granted this motion, and entered a judgment in favor of the plaintiff for $99.99. The defendant has appealed from that judgment.

Respondent moves to dismiss the appeal for the reason that the original amount involved is less than two hundred dollars. The constitution, at § 4 of article 4, provides that the appellate jurisdiction of this court shall not extend to civil actions at law for the recovery of money when the "original amount in controversy or the value of the property does not exceed the sum of two hundred dollars." In *Northern Pac. R. Co. v. Shoemake*, 69 Wash. 140, 124 Pac. 385, Ann. Cas. 1914A 1040, in discussing the meaning of this provision of the constitution, we said:

"We think that, when the framers of the constitution used the words 'original amount in controversy,' they had reference to the amount severally claimed by the respective parties in their pleadings. They did not mean that, if the sum of the opposing claims exceeded $200, the court would have appellate jurisdiction. When an action is commenced, the amount sued for is the test of jurisdiction. If the adverse party asserts a counterclaim, he to that extent becomes an

actor, and in so far as the question of jurisdiction is involved, he will be treated as if he were commencing an independent suit."

It is claimed that each of the automobiles was damaged by the collision more than one hundred dollars. The respondent brought suit in the justice court, alleging that his automobile had been damaged in the sum of $99.99, evidently for the purpose of giving the justice court jurisdiction of the case. The appellant here counterclaimed and alleged that its automobile was damaged in the sum of $99.99, and sought a judgment therefor. The statutes of this state limit the jurisdiction of a justice of the peace to cases involving less than one hundred dollars. Rem. Code, § 44. Each of the parties here, when the case was originally brought, voluntarily waived the damages in excess of one hundred dollars, in order to give the justice court original jurisdiction. After the case was appealed to the superior court, and tried upon the original complaint, answer, and counterclaim, and after a verdict of a jury had been set aside, the appellant filed an amended answer, alleging damages in the sum of $293. Assuming, without deciding, that this was a proper amendment to be allowed by the court, we think it did not change the "original amount in controversy," which was $99.99. When the action was originally brought in the justice court, the parties voluntarily stated the amount of their claims, each against the other, at $99.99. They thereby waived any claim for a larger amount. The appellant argues, in substance, that, if it be held that $99.99 is the original amount in controversy, then, in a case like this, where each has injured another's property, one may bring an action in the justice court for less than one hundred dollars, and prevent the other party from counterclaiming for more than one hundred dollars, and thus defeat the greater claim. But we think it is plain that it was not necessary for the appellant to set up its counterclaim in the justice court for an amount less than the actual damage. It

could have defended there without setting up the counterclaim, and at the same time have maintained an action for a greater amount in the superior court. When it failed to do so, but sought recourse in the justice court by waiving its claim for any larger amount than $99.99, it thereby fixed the original amount in controversy, and it cannot now be heard to say that the original amount in controversy has been changed so as to give this court jurisdiction. We are satisfied that, when the constitution used the words "original amount in controversy," it meant the "original" amount which was in controversy when the action was begun. This action was begun in the justice court. The *original amount* in controversy was $99.99. This court, therefore, does not have jurisdiction. The appeal is, for that reason, dismissed.

MORRIS, HOLCOMB, FULLERTON, and PARKER, JJ., concur.

[No. 13639. Department One. February 16, 1917.]

A. O. HELLAN, *Appellant*, v. SUPPLY LAUNDRY COMPANY, *Respondent*.[1]

MUNICIPAL CORPORATIONS—STREETS — ACCIDENTS AT CROSSINGS—AUTOMOBILE COLLISION—PROXIMATE CAUSE—CONCURRENT NEGLIGENCE—QUESTION FOR JURY. As there may be more than one proximate cause for an accident, and where the independent negligence of different persons concurs, all may be liable; and as proximate cause is a mixed question of law and fact and for the jury unless the facts are undisputed and the inferences plain, it is error to decide, as a matter of law, that the act of defendant C. in colliding with plaintiff's automobile was the proximate cause of the accident, and that defendant laundry company would therefore not be liable, where it appeared from the complaint and statement of counsel that defendant C., who was approaching a street intersection at an unlawful speed, was compelled to turn suddenly into plaintiff's car when the laundry company's auto truck, also going at an excessive speed, unlawfully cut the corner at the street intersection and got in the path of the car of defendant C.; since what a reasonably prudent person will do in a sudden emergency is always a question for the jury, unless reasonable minds cannot differ thereon.

[1]Reported in 163 Pac. 9.

SAME. In such a case, the probability of an injury need not be so obvious as to be necessarily anticipated by the wrongdoer, who is liable for any injuries proximately resulting if his act was one that in the exercise of ordinary care he ought to have anticipated was apt to result in injury to others, although he could not have anticipated the particular injury.

Appeal from a judgment of the superior court for King county, Frater, J., entered July 8, 1916, upon granting a nonsuit, dismissing an action for personal injuries sustained in an automobile collision, tried to the court and a jury. Reversed.

Geo. McKay and *Henry S. Noon*, for appellant.

James B. Murphy and *Robert C. Saunders*, for respondent.

ELLIS, C. J.—This is an appeal from a judgment dismissing an action for personal injuries.

Stewart street, in the city of Seattle, runs east and west. Seventh avenue runs north and south, crossing Stewart street at right angles. In the complaint, it is alleged that, while plaintiff was crossing Seventh avenue on the south side of Stewart street, exercising care and caution for his own safety, defendant J. B. Corkum carelessly, negligently, unlawfully and in wilful violation of the city ordinances, drove his automobile east along Stewart street at an excessive speed, without sounding any horn or whistle or giving other warning, and carelessly and negligently struck and injured plaintiff.

It is further alleged that, at the time of the accident, an auto delivery truck of defendant Supply Laundry Company, driven by one of its servants, running west on Stewart street at an unlawful and dangerous rate of speed in violation of the city ordinances, at the intersection of the two streets mentioned, turned south onto Seventh avenue, going diagonally across the street, making a rapid, short, sharp, unlawful turn in violation of the city ordinances, intersected the path of the Corkum automobile, so that Corkum was compelled to turn suddenly south on Seventh avenue to avoid a collision

with the delivery truck and thereby struck plaintiff, and that the negligence of defendant Supply Laundry Company, through its agent and servant, "accentuated the negligence of said Corkum and directly contributed to and caused the injury to the plaintiff."

The substance of counsel's opening statement was as follows: That plaintiff's evidence would show that he was going west on the south side of Stewart street; that, when he reached Seventh avenue, the Corkum automobile was going east on the south side of Stewart street and the laundry truck was going west on the north side of Stewart street; that, when he started across Seventh avenue, the laundry truck made a sudden turn to the south going to the east, the left and wrong side of the center of the street intersection, cutting the corner, and taking the east, the wrong side, of the avenue; that in executing this movement, in violation of the law and city ordinances, the truck made a line for the other automobile, and that Corkum, in an effort to escape a collision, put on his brakes, turned quickly to the south and, in so doing, struck plaintiff.

It is admitted that, since the commencement of the action, Corkum has died, and thereafter the cause was prosecuted against the Supply Laundry Company alone.

At the close of the above statement, counsel for defendant moved upon that statement that the jury be discharged and that judgment be entered for defendant. Granting the motion, the court said:

"I want the record to show that on the complaint and from the statement that you [Mr. Judd, plaintiff's then counsel] made it is impossible to state a cause of action which would sustain a judgment."

The action was dismissed "with prejudice to the commencement of any other action." Plaintiff appealed.

In support of the court's action, it is urged that, under the facts pleaded and stated by counsel, Corkum's negligence was, as a matter of law, the proximate cause of the injury,

while that of respondent's driver was a mere condition. The most usual definition of proximate cause found in the books is either the following or some of its paraphrases:

"The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces that event, and without which that event would not have occurred." 1 Shearman & Redfield, Negligence (6th ed.), § 26.

See, also, Cooley, Torts (3d ed.), p. 124. There may be more than one proximate cause for the same injury. The negligence of different persons, though otherwise independent, may concur in producing the same injury. In such a case, all are liable. They may be held either jointly or severally. The negligence of one is no excuse for that of another.

"If the damage has resulted directly from concurrent wrongful acts or neglects of two persons, each of these acts may be counted on as the wrongful cause, and the parties held responsible, either jointly or severally, for the injury. It is well settled by the adjudged cases that when an injury is the result of the combined negligence of the defendant and the negligent or wrongful act of a third person, for whose act neither the plaintiff nor the defendant is responsible, the defendant is liable, when the injury would not have happened except for his negligence. Thus, if two persons wrongfully block up a street, so that one is injured in attempting to pass them, neither of the culpable parties can excuse himself by showing the wrong of the other, for the injury is a natural and proximate result of his own act under the then existing circumstances, and to excuse either would be to deny all remedy in the case of plain and palpable injury." Cooley, Torts (3d ed.), pp. 119-123.

See, also, 1 Shearman & Redfield, Negligence (6th ed.), § 31. The question of proximate cause is a mixed question of law and fact. It is usually a question for the jury. It is only where the facts are undisputed and the inferences to be drawn from them are plain and incapable of reasonable doubt or difference of opinion that it may become a question of law

for the court. Cooley, Torts (3d ed.), p. 111; 1 Shearman & Redfield, Negligence (6th ed.), § 55.

In considering the application of these principles to the case here presented, we must, of course, assume as true all of the facts stated in the complaint, except in so far as they are contradicted or modified by the opening statement of appellant's counsel. In drawing the complaint, it seems plain that the pleader was attempting to state the full facts as a cause of action for concurrent negligence on the part of both Corkum and respondent here. He was seeking a recovery against both. But Corkum having died, counsel, in his statement outlining the evidence which he would offer, laid little stress upon the alleged negligence of Corkum, but dwelt mainly and at length on the facts which would tend to show negligence on the part of respondent's driver as a proximate or efficient cause of the injury. The only negligence charged against Corkum, either in the complaint or statement, was that of excessive speed and the failure to sound a horn or whistle. He was on the side of the street proper for vehicles going in an easterly direction. From the whole complaint, the inference is clear that, but for the excessive speed and the sudden rapid and unlawfully premature deviation in the course of respondent's car, carrying it to the wrong side of the center of the street intersection and to the wrong side of Seventh avenue, Corkum would have passed plaintiff safely, notwithstanding his own excessive speed and failure to give warning of his approach. But it is urged that Corkum's act in turning to the south instead of to the north was an independent act of negligence breaking the chain of causation, isolating respondent's negligence and making it a mere condition. It is true, as pointed out by respondent, that it was not alleged in terms that Corkum could not have turned his car to the north, but it was so alleged inferentially, and appellant is entitled to the benefit of every favorable inference. It was alleged that he "was compelled to turn suddenly to the south" to avoid a collision with respondent's car. That

car was coming rapidly from the north, and it was at least inferred that a turn in that direction would have enhanced the danger of the collision which Corkum alone was trying to avoid. He was acting in a sudden emergency, and what, in such a case, is reasonably prudent conduct is always a question for the jury unless it can be said that the minds of reasonable men cannot differ thereon.

Appellant argues, and we think soundly, that this phase of the case is controlled by the rule announced in *Scott v. Shepherd* (the squibb case), 2 Wm. Blackstone 892, and also in *Gibbons v. Pepper*, 1 Ld. Raymond 38; *Jones v. Boyce*, 1 Starkie 493, and *Lowery v. Manhattan R. Co.*, 99 N. Y. 158, 52 Am. Rep. 12. In those cases, it is true, the person whose act in the emergency resulted in the injury had not been guilty of antecedent negligence, but we fail to perceive any reasonable differentiating significance in that fact. If the act, by reason of the emergency, is not itself negligent as a matter of law, it can make no possible difference how the emergency arose if the injured person were not culpable. The emergent act cannot become negligence in law merely to relieve another concurrent wrongdoer from a liability for injury which he at least made no effort to avoid. It is true, also, that, had the emergency been created solely by Corkum's own prior negligence, the injury inflicted in his efforts to extricate his car would be attributed solely to that prior negligence. Here, however, the emergency was not wholly nor even chiefly one of his own creation. Had the cars collided, there would be grave doubt whether, on the facts here, either owner would have been permitted to recover for the resultant injury. But such is not the case before us. Here an innocent third party was injured.

Respondent further argues that the accident would not have happened had Corkum stopped his car or had he been running at a lawful rate of speed. This may be conceded. But it is equally true that, notwithstanding his failure to stop and notwithstanding his excessive speed, no accident

would have happened had respondent's truck been stopped, or had it been running at a lawful rate of speed, or had it even kept to the right side of the intersection and the right side of the street. Respondent further asserts that its driver, though himself negligent, was not bound to anticipate Corkum's negligence. This also may be conceded. But neither was Corkum bound to anticipate respondent's negligence. These things might be material if the question were one between the two negligent parties. They are immaterial so far as the injury to plaintiff, a third person wholly free from fault, is concerned. Every argument advanced as showing that respondent's negligence was a mere condition and not the proximate cause applies with equal force to Corkum's negligence. Appellant should not be permitted to fall between two stools through a mere juggling of terms. It seems to us plain that the complaint stated a cause of action for concurrent negligence, and that the statement of anticipated proof made a case for the jury. Upon the facts pleaded and stated, it would be for the jury to say, under proper instructions, whether the negligence of Corkum or that of respondent was the proximate cause or whether both were proximate and concurrent causes. This court, in common with some others, has said that "any injury which could not have been foreseen or reasonably anticipated as the probable result of an act of negligence is not actionable," in that the act is too remote to be a proximate cause. *Ottevaere v. Spokane*, 89 Wash. 681, 155 Pac. 146. But that language must not be taken in an absolute sense. It does not mean that the probability of injury must be so obvious as to be necessarily anticipated by the wrongdoer, nor does it mean that he must have reasonably anticipated that injury would probably result to the exact person or in the exact form or way in which it did result. 1 Shearman & Redfield, Negligence (6th ed.), §§ 28, 29 and 29a. We know of no more exact expression of the true rule than that

of the supreme court of Minnesota, quoted with apparent approval by Cooley:

"The law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow." *Christianson v. Chicago, St. P., M. & O. R. Co.*, 67 Minn. 94, 69 N. W. 640.

See, also, Cooley, Torts (3d ed.), p. 138.

We shall not consume space by a review of the many cases cited by respondent. Every case largely depends upon its particular facts. As we view the cases cited, they are not controlling.

We are clear that the facts pleaded and stated, which we must assume to be true, made a case for the jury upon every question presented. The judgment is reversed, and the cause is remanded for further proceedings.

MORRIS, MOUNT, MAIN, and CHADWICK, JJ., concur.

[No. 13543. Department Two. February 16, 1917.]

The State of Washington, *on the Relation of South Fork Log Driving Company, et al., Plaintiff*, v. The Superior Court for Pacific County, *M. L. Clifford, Judge, et al., Respondents.*[1]

Eminent Domain—Property Previously Devoted to Public Use—Public Necessity—Evidence—Sufficiency. The property and riparian rights held and used by a public service corporation for the purpose of furnishing water to a city, and necessary for its present and future use, cannot be condemned by another public service corporation to be devoted to the same use to which the company already in business intends to devote it, where the public interest does not require it; and public necessity therefor is not sufficiently shown, where it appears that the first company is a going concern, is furnishing an adequate supply of water to the city, and will very soon require an increase and it is its intention to use its property not now actually devoted to a public use, for that purpose, holding the same in reasonable anticipation of future needs.

Certiorari to review a judgment of the superior court for Pacific county, Clifford, J., entered May 12, 1916, adjudging a public use and necessity in eminent domain proceedings, tried to the court. Reversed.

Welsh & Welsh, Hayden, Langhorne & Metzger, and *Shepard, Burkheimer & Burkheimer*, for relators.

Fred M. Bond, for respondents.

Mount, J.—This is a proceeding by certiorari to review an adjudication of public use and necessity in an action for condemnation. In the petition for condemnation, the Willapa Power Company alleged, in substance, that it was authorized by its articles of incorporation to furnish the city of South Bend with electricity for municipal, domestic, and other purposes, and the inhabitants thereof with electricity for power purposes, and also to furnish water to the city of South Bend and the inhabitants thereof and other persons, for do-

[1]Reported in 163 Pac. 15.

mestic use, fire protection, and other purposes; that it had obtained franchises from the city for these purposes, and also from Pacific county for the purpose of conveying water along the public roads, and for pole lines for electrical appliances; that it was necessary to use the waters of the south fork of the Willapa river for the purposes of generating electricity, and for furnishing water to the city of South Bend. Numerous parties were made defendants, among them the South Fork Log Driving Company, the Weyerhaeuser Timber Company, and the Northwest Electric & Water Works.

The South Fork Log Driving Company defended upon the ground that it was a public service corporation, duly organized and authorized to perform a public duty; that it had cleared out and improved the south fork of the Willapa river, in Pacific county, its entire length, and was using the same for the purpose of driving, sorting, holding, and delivering logs and other timber products; that, if the waters of the south fork of the Willapa river were condemned and taken over by the petitioner, its business would be injured, or entirely destroyed.

The Weyerhaeuser Timber Company defended upon the ground that it was the owner of a large tract of timber land, situated along the banks of the south fork of the Willapa river; that this river was navigable for logging purposes; and alleged that all the land belonging to it, and the timber situated thereon, constituted one tract, and that the availability of this timber to market was of greater public importance than the proposed enterprise; and that the taking from it of its riparian rights, and diverting the waters of this river, would render its timber and timber lands of no value, because there is no other practical method of marketing this great body of timber.

The Northwest Electric & Water Works defended upon the grounds that it is a public service corporation, under franchise duly granted to it, and is now, and has been, furnishing an adequate supply of water to the city of South

Bend and the inhabitants thereof, for municipal and domestic uses and purposes; that it acquired the lands sought to be condemned by the petitioner, upon the Willapa river, for the purpose of enabling it to furnish the city of South Bend with water; that it was its *bona fide* intention to appropriate said water for that purpose; that it was necessary, and acquired by it, for that purpose; that it acquired the lands long prior to the commencement of this action; that it did so in reasonable anticipation of the future needs of the city of South Bend and the inhabitants thereof; that, at the time of purchasing said lands and water rights, it was, and now is, the intention of the Northwest Electric & Water Works, in good faith, to use and improve said lands and water rights in the near future; and it intends, in good faith, to so improve and utilize said lands and water rights.

In reply to these answers, the Willapa Power Company denied the material allegations thereof. Upon these issues, the case was tried to the court, and resulted in a finding of necessity and public use. Thereupon this writ was sued out by the relators.

The controlling question in the case is whether the Willapa Power Company may take the property of the Northwest Electric & Water Works and devote this property to the same use that the Northwest Electric & Water Works intends to devote it to. The plan of the Willapa Power Company to use the waters of the south fork of the Willapa river is outlined in the evidence substantially as follows:

It is proposed to erect a dam on the headwaters of the south fork of the Willapa river, so that the waters of that river may be stored to a level of 520 or 600 feet above sea level. This will necessitate the flooding of large tracts of land belonging to the Weyerhaeuser Timber Company. It is proposed to impound all the water by means of this dam, and take the water out of its natural channel for a distance of several miles, and, at a point two miles below this dam, erect a proposed main plant to generate electricity, then

public service corporation which is now, and has been, doing business in the city of South Bend may be taken by the condemning company. As stated above, it appears without contradiction in the evidence that the Northwest Electric & Water Works, now furnishing water to the city and citizens of South Bend, is a going concern. It is furnishing an adequate supply of pure water. The record shows that the demand for water is increasing, and that in a very short time, if not at the present time, more water will be needed by that company; that it has purchased land upon the south fork of the Willapa river in order to obtain a more abundant supply, and it is the intention of that company, in the near future, to obtain its supply of water from that source, and that the same is reasonably necessary for the purpose, and, while this property is not now actually devoted to a public use, it was purchased, and is held, in reasonable anticipation of future needs, and it is, therefore, deemed devoted to a public use, although not actually in use. (See authorities cited above.)

It is plain, we think, that there can be no public interest in an enterprise when the public is already being served in the same manner and with the same commodity which is sought to be introduced. The only public interest is service, and when the public is served adequately, then it follows that there is no public interest in a new public enterprise for the same purpose sufficient so that the new enterprise may take the property of the one doing the same service. This is especially true, we think, in regard to public service corporations like water companies in this state, where such companies are controlled by the public service commission. The rate is fixed and the service enforced by that commission. We are satisfied, therefore, that the trial court erred in concluding that there was such public interest here as demanded that a new company, intending to perform the same service as an old company, may condemn any of the property of the old company.

It is argued by the respondent that, in the purchase of the land by the Northwest Electric & Water Works, that company did not acquire the water in the stream which flowed upon its land. It is probably correct to say that it does not own the water which flows across the land, but it does own the riparian right, subject to the right of lower riparian owners, and is, of course, entitled to utilize that water, subject to such rights.

It is unnecessary to consider the rights of the Weyerhaeuser Timber Company and the South Fork Log Driving Company, because it is not shown that, without the right of the respondent to divert the water from the channel of the river, and thereby take it away from the Northwest Electric & Water Works, the plan proposed may succeed. On the other hand, the evidence, we think, shows that, unless the water can be diverted by the dam, proposed above the land of the Northwest Electric & Water Works, then the project is not feasible.

We are satisfied, upon the record, that the trial court erred in concluding that the public interest required the new enterprise, and in ordering a condemnation of the rights of the Northwest Electric & Water Works upon this river, and, for that reason, the judgment must be reversed. It is so ordered.

MORRIS, HOLCOMB, FULLERTON, and PARKER, JJ., concur.

[No. 13734. Department One. December 29, 1916.]

D. ARONSON, *Respondent*, v. E. F. SWEENEY, *Appellant*.[1]

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 8, 1916, upon findings in favor of the plaintiff, in an action by a lessee to recover a deposit paid the lessor to be applied as rent upon premises leased for saloon purposes, tried to the court. Affirmed.

Kerr & McCord, for appellant.
Preston & Thorgrimson, for respondent.

PER CURIAM.—This case involves a lease for a saloon and wholesale liquor store, and involves in general the same propositions as were considered in the case of *The Stratford v. Seattle Brewing & Malting Co.*, *ante* p. 125, 162 Pac. 31. For the reasons there discussed and determined, the same result is reached herein.

Judgment affirmed.

[No. 13212. *En Banc*. January 26, 1917.]

KLOCK PRODUCE COMPANY, *Appellant*, v. DIAMOND ICE & STORAGE COMPANY, *Respondent*.[2]

Appeal from a judgment of the superior court for King county, Dykeman, J., entered October 19, 1915, upon findings in favor of the defendant, in an action for conversion, tried to the court. Reversed.

Frank S. Griffith, for appellant.
James B. Howe and *A. J. Falknor*, for respondent.

ON REHEARING.

PER CURIAM.—Upon a rehearing *En Banc*, a majority of the court still adhere to the opinion heretofore filed herein as reported in 90 Wash. 67, 155 Pac. 414, and for the reasons there stated, the judgment is reversed.

[1]Reported in 162 Pac. 35.

[2]Reported in 162 Pac. 359.

[No. 13531. Department Two. February 2, 1917.]

C. G. CROMBIE, *Appellant*, v. JENNIE M. CROMBIE, *Respondent*.[1]

Cross-appeals from a judgment of the superior court for King county, Smith, J., entered February 7, 1916, upon findings in favor of the defendant, in an action for divorce, tried to the court. Affirmed.

Frank A. Paul, for plaintiff.
Griffin & Griffin, for defendant.

PARKER, J.—This is an action for divorce in which each party seeks a decree against the other. The trial court awarded decree of divorce in favor of the defendant, and also awarded her suit money and thirty dollars per month alimony. Both parties have appealed to this court. The plaintiff contends that the trial court erred in refusing to grant the divorce in his favor and that the award of suit money and alimony to the defendant is excessive. The defendant contends that the trial court erred in not awarding her a more liberal allowance.

A painstaking review of the evidence convinces us that the decree should be affirmed in all respects. We refrain from discussing here the distressing facts disclosed by the evidence. There are no questions of law involved calling for serious consideration.

The decree is affirmed.

MORRIS, MOUNT, HOLCOMB, and FULLERTON, JJ., concur.

[1]Reported in 162 Pac. 1183.

[No. 13526. Department One. February 10, 1917.]

JOHN W. CRAWFORD *et al.*, *Appellants*, v. LOUIS P. SICHLER, *Trustee et al.*, *Respondents*, HAVEN IRRIGATION & LAND COMPANY, *Intervener*.[1]

Appeal from a judgment of the superior court for Grant county, Steiner, J., entered October 29, 1915, upon findings in favor of the defendants, in an action for equitable relief, tried to the court. Affirmed.

Henry J. Snively, *James Collins Lloyd*, and *Charles F. Riddell*, for appellants.

McClure & McClure (*Walter S. Osborn*, of counsel), for respondent FOX.

Joseph R. Anderson, for intervener.

PER CURIAM.—The facts in this case are substantially the same as in the case of *Lloyd v. Sichler*, *ante* p. 611, 162 Pac. 979. The case is controlled by the same principle of law.

Upon the authority of the case cited, the judgment of the lower court is affirmed.

[1]Reported in 162 Pac. 981.

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1. ATTORNEY AND CLIENT—ATTORNEY'S LIEN—POSSESSION OF PAPERS—BOND—STATUTES. Under Rem. Code, § 137, providing that the court may require an attorney to deliver over money or papers received

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in the course of his employment, and § 138, providing that, if the attorney claims a lien, the court may fix the amount of security to be given by the client to satisfy the lien or may summarily inquire into the facts on which the lien is founded, it is error, on application of the client for the delivery of money, books, and papers, for the court to do neither and to dismiss the proceedings, on the theory that the rights of the parties could be tried out in the attorney's action for fees and expenses; since the client was entitled to his property pending such litigation. *State ex rel. Robinson Co. v. Gilliam* 243

AUTHORITY:

Of public service commission in adopting rules governing reciprocal demurrage charges for failure to furnish cars to shippers, see CARRIERS, 2.

Of canvassing boards, see ELECTIONS, 1.

Of agent, see PRINCIPAL AND AGENT, 2.

AUTOMOBILES:

License tax, exemptions, see LICENSES, 3-5.

License for motor vehicles for hire in cities of first class, see MUNICIPAL CORPORATIONS, 14, 15.

Collision with in city street, see MUNICIPAL CORPORATIONS, 19, 21, 22, 25, 27.

Collision with street car in city street, see STREET RAILROADS.

BAILMENT:

1. BAILMENT — FOR HIRE — NEGLIGENCE. The proprietor of a natatorium, operating a check room, is liable as a bailee for hire for failure to exercise ordinary care over valuables left with an attendant in charge of the check room. *Thompson v. Seattle Park Co.*. 539

BALANCE:

Evidence of balance due under profit-sharing contract, see JOINT ADVENTURES, 4.

BALLOTS:

Designation of office, see ELECTIONS, 2.

BANKRUPTCY:

1. BANKRUPTCY — SCHEDULE OF PROPERTY — COMMUNITY DEBT AND PROPERTY. Where a judgment was recovered against a husband and wife, as a community debt, and the husband filed a petition in bankruptcy and was declared a bankrupt, a lot constituting community property and a tract conveyed by the husband to the wife as her separate property in fraud of creditors are properly scheduled as assets in the bankruptcy proceeding. *Strong v. Durdle*..... 157

BANKRUPTCY—CONTINUED.

2. SAME—SCHEDULE OF PROPERTY — PROCEEDINGS — AMENDMENT — NOTICE. An amendment adding certain property to the schedule of assets of a bankrupt cannot be attacked for want of notice by one who had her day in court in an action to determine that the property was an asset and liable for the debts. *Strong v. Durdle*.... 157

3. SAME—PROPERTY CONVEYED IN FRAUD OF CREDITORS—SALE—RIGHTS OF PURCHASER—QUIETING TITLE. Since a trustee in bankruptcy has a right to sell property which has been conveyed fraudulently more than four months prior to the filing of the petition, the purchaser from the trustee may maintain an action to quiet his title against the fraudulent grantee. *Strong v. Durdle*..... 157

4. SAME—SALE—QUIETING TITLE — FORM OF DECREE. Where title to property of a bankrupt, fraudulently conveyed more than four months prior to the filing of the petition, was quieted in the purchaser from the trustee in bankruptcy, the fraudulent grantee has no right to redeem the property; and hence cannot complain of a provision in the decree giving her the right to redeem within one year upon paying the purchaser's claim against the bankrupt's estate. *Strong v. Durdle*..... 157

BANKS AND BANKING:

Advancements to contractor on public work, see MUNICIPAL CORPORATIONS, 1, 2.

Right of depositor to offset deposit credit against notes in action by bank on notes, see SET-OFF AND COUNTERCLAIM.

BAR:

Pendency of other action, see ABATEMENT AND REVIVAL.

Judgment as bar to proceedings for supplemental assessment, see DRAINS, 1.

Of action by former adjudication, see JUDGMENT, 8.

Of action by limitation, see LIMITATION OF ACTIONS.

BENEFITS:

Assessment for benefits from drainage district, see DRAINS.

To property from public improvement, see MUNICIPAL CORPORATIONS, 6-9, 11-13.

BEQUESTS:

See WILLS.

BILL OF PARTICULARS:

See PLEADING, 5.

BILLS AND NOTES:

Sureties on notes, see PRINCIPAL AND SURETY.

Right of depositor to set off deposit credit against amount due on

BILLS AND NOTES—CONTINUED.

notes, after assignment to third party, see SET-OFF AND COUNTERCLAIM.

1. BILLS AND NOTES—NEGOTIABILITY—MATURITY—OPTION—STATUTES—CONSTRUCTION. A note containing a provision that it shall become due and payable on demand at the option of the payee when it deems itself insecure, is not negotiable, under Rem. Code, § 3392, providing that an instrument to be negotiable must be payable on demand or at a fixed or determinable future time, which, by Id., § 3395, means at a fixed period after the occurrence of a specified event which is certain to happen though the time of happening be uncertain; that section further providing that an instrument payable upon a contingency is not negotiable. *Puget Sound State Bank v. Washington Paving Co*..... 504

2. SAME—NEGOTIABILITY—DEMAND NOTES. Such a note with a reserved power in the payee to declare it due before the stated time of maturity is not negotiable as a demand note under Rem. Code, §§ 3392 and 3444. *Puget Sound State Bank v. Washington Paving Co*..... 504

3. SAME—HOLDER IN DUE COURSE—DELIVERY WITHOUT INDORSEMENT. The transferee of a note by delivery without indorsement is not a holder in due course, in view of Rem. Code, § 3440, providing that, by such delivery, he acquires the right to an indorsement, but for the purpose of determining whether he is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made. *Puget Sound State Bank v. Washington Paving Co*..... 504

4. BILLS AND NOTES—EXTENSION OF TIME—CONSIDERATION—EVIDENCE—SUFFICIENCY. Where the plaintiff was the holder of notes given in payment of the purchase price of mining machinery, and was also the owner of a water right leased to the maker of the notes, who had paid $1,600 on the notes to plaintiff's agent and was unable to proceed in his operations without the water, the maker's consent to divert $600 of such payment and apply the same to payment of the lease of the water is sufficient consideration for plaintiff's extension of time for payment of the balance due on the notes for the period of one year. *Lipsett v. Dettering*..... 629

5. BILLS AND NOTES—PAYMENT—EVIDENCE—SUFFICIENCY. Payment of a note which bore indorsements of principal and interest in the handwriting of the maker, is not proven by receipts and cancelled checks, made on the dates the credits were made on the note, and which might have applied to other transactions between the parties. *Bingham v. Domer*..... 253

6. SAME—PAYMENT—SERVICES—PLEADINGS. In an action upon a note, services rendered to the payee cannot be shown under a plea of payment. *Bingham v. Domer*..... 253

BONA FIDE PURCHASER:

Of bill of exchange or promissory note, see BILLS AND NOTES, 3.

BONDS:

On appeal, see APPEAL AND ERROR, 8, 9.
Redelivery bonds, see ATTACHMENT.
To satisfy lien of attorney on delivery of money or papers received in course of employment, see ATTORNEY AND CLIENT.
Premium paid for bond as item of costs, see COSTS, 1.
Contractor's bonds, see MUNICIPAL CORPORATIONS, 1-5.
For operation of motor vehicles for hire in cities of first class, see MUNICIPAL CORPORATIONS, 14, 15.
Of contractor on railroad work, see RAILROADS, 7, 8.

BOUNDARIES:

1. BOUNDARIES—LOST CORNERS—EVIDENCE—SUFFICIENCY. In an action to establish a lost boundary line, evidence to the effect that the defendant set his fences seventeen feet beyond the line indicated by stakes of the original survey, some of which were still standing, is sufficient to make out a *prima facie* case. *Weidlich v. Independent Asphalt Paving Co*..... 395

BREACH:

Of warranty, see SALES, 2-4.
Of contract of sale, see SALES, 5, 6.

BRIDGES:

Condemnation for by city, see EMINENT DOMAIN, 4.
Duty of city to maintain bridge railing, see MUNICIPAL CORPORATIONS, 20.

BROKERS:

Larceny by embezzlement, see EMBEZZLEMENT, 1.

1. BROKERS—COMMISSIONS—CONTRACT—PERFORMANCE. Where parties to a contract for the sale of corporate stock agreed to a modification of the same, the broker making the sale, who had contracted to find a purchaser, and who, after the modification, agreed to take his commissions in $3,500 in first mortgage bonds of the corporation as enlarged by the sale, is not entitled to any commissions unless the contract is carried out. *Bader v. Moore Building Co*..... 221

2. BROKERS—RIGHT TO COMMISSIONS — CONTRACT — PERFORMANCE. A broker agreeing to take commissions in bonds on completion of a contract cannot complain that the seller did not enforce the contract but exercised an option, reserved in the contract, to cancel the same on the default of the buyer, where there was no fraud practiced and no arbitrary refusal to enforce the contract. *Bader v. Moore Building Co*..... 221

BUILDINGS:

Readjustment of by owner in contemplation of second condemnation, see EMINENT DOMAIN, 8.

BURDEN OF PROOF:

On stockholder to show holding of stock as collateral security, see CORPORATIONS, 2.

To show fraud, see FRAUDULENT CONVEYANCES.

To overcome recitals in judgment, see JUDGMENT, 2.

To show negligence of master, see MASTER AND SERVANT, 11.

CANCELLATION OF INSTRUMENTS:

Oral rescission of option for sale of real estate, see FRAUDS, STATUTE OF, 1.

Termination of lease, see LANDLORD AND TENANT, 1, 4, 5.

CANDIDATES:

For office, see ELECTIONS.

CANVASSING BOARDS:

Powers of for irrigation district election, see ELECTIONS, 1.

CARRIERS:

Right to claim lien for cartage of materials furnished for vessel, see MECHANICS' LIENS, 8, 9.

1. CARRIERS—REGULATION — RECIPROCAL DEMURRAGE—CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWERS. Since reciprocal demurrage charges for delay in failing to furnish a shipper with cars, after demand, though called a penalty, is remedial redress, administrative in its essence and incidental to administrative functions, and since the constitutional division of governmental powers into three separate departments applies only in a limited sense and does not restrict one set of officers to one department exclusively, Rem. Code, §§ 8626-59, 8626-85, empowering the public service commission to fix the time for furnishing cars and provide the penalty to be paid shippers for delays, is not unconstitutional as an unlawful delegation of legislative powers, in contravention of Const., art. 2, § 1; sections 8626-10 and 8626-11, having imposed in express terms the duty to promptly furnish cars. *State ex rel. Chicago, Milwaukee & St. Paul R. Co. v. Public Service Commission*..... 274

2. SAME. Though judicial power may be conferred by the legislature upon the public service commission, that body cannot assume the legislative function and confer such power upon itself; hence the public service commission cannot, under authority to adopt rules governing reciprocal demurrage charges for failure to furnish cars, adopt a rule providing that, when any dispute or controversy arises between shipper and carrier with reference to the application of the rules for demurrage, a complaint shall be filed with the commission

CARRIERS—CONTINUED.

and a trial had subject to review in the same manner as other decisions and orders of the commission. *State ex rel. Chicago, Milwaukee & St. Paul R. Co. v. Public Service Commission*..... 274

3. SAME—RECIPROCAL DEMURRAGE—REMEDIES OF SHIPPER. The statute providing no method for the collection of demurrage charges to be paid to shippers for delay in furnishing cars, the remedy of the shipper is by action at law; there being no right without a remedy. *State ex rel. Chicago, Milwaukee & St. Paul R. Co. v. Public Service Commission* 274

4. SAME—RECIPROCAL DEMURRAGE—INTERSTATE COMMERCE — STATUTES —CONSTRUCTION. Although the terms of Rem. Code, §§ 8626-59, 8626-85, empowering the public service commission to fix the time for furnishing cars and provide the penalty to be paid shippers for delays is broad enough to apply to cars ordered for interstate commerce, the dominant purposes of the act, to be gathered from all of its provisions, to regulate only intrastate commerce must be read into all its provisions. *State ex rel. Chicago, Milwaukee & St. Paul R. Co. v. Public Service Commission*..... 274

5. SAME. It will not be assumed that the legislature intended to adopt the construction of other state courts that such rules applied to both kinds of commerce, when to do so would make the law unconstitutional. *State ex rel. Chicago, Milwaukee & St. Paul R. Co. v. Public Service Commission*..... 274

6. CARRIERS—DEFECT IN SLIPS—EVIDENCE — OTHER ACCIDENTS. In an action for personal injuries sustained by a fall upon a defective disembarking stairway, it is competent to show that prior thereto others had tripped on the same defect. *Henry v. Navy Yard Route*..... 526

CARTAGE:

Right of common carrier to claim lien for, see MECHANICS' LIENS, 8, 9.

CAUSE OF ACTION:

Joinder of, see ACTION.

CERTAINTY:

Of verdict, see CRIMINAL LAW, 8.
Of ballots in designating term of office, see ELECTIONS, 2.
In describing property in contract, see SPECIFIC PERFORMANCE, 1.

CERTIFICATE:

Of award on condemnation by state, see EMINENT DOMAIN, 11.

CHARGE:

To jury in criminal prosecutions, see CRIMINAL LAW, 2, 6, 7, 13, 14, 17.
To jury in civil actions, see TRIAL, 7.

CITATION:

On appeal, see APPEAL AND ERROR, 5-7.

CITIES:

See MUNICIPAL CORPORATIONS.

CITIZENS:

Privileges and immunities, see CONSTITUTIONAL LAW, 4.
Equal protection of laws, see CONSTITUTIONAL LAW, 5.

CLAIMS:

Against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 2-4.
Mining claims, location of, see MINES AND MINERALS, 1-3.
Against bond of contractor on public work, see MUNICIPAL CORPORATIONS, 1-5.
Against city, see MUNICIPAL CORPORATIONS, 28.
Against property in hands of receiver, see RECEIVERS, 2.

CLASS LEGISLATION:

See CONSTITUTIONAL LAW, 4.

COLLATERAL SECURITY:

Improper dealings with as discharging surety, see PRINCIPAL AND SURETY, 2.

COLLECTION:

Of demurrage charges by shipper for delay in furnishing cars, see CARRIERS, 3.

COLLISION:

Between automobile and street car, see STREET RAILROADS.

COMMENT:

By judge as denial of fair trial, see TRIAL, 1.

COMMERCE:

Carriage of goods and passengers, see CARRIERS.

1. COMMERCE—INTERSTATE COMMERCE—OIL INSPECTION LAW. Where oil is brought into this state for the purpose of sale, Rem. Code, § 6052, providing for inspection and levying a remunerative inspection fee on all oils and gasoline "before being sold or offered for sale," does not violate U. S. Const., art. 1, § 8, cl. 3, reserving to Congress the power to regulate interstate commerce. *Standard Oil Co. v. Graves*..... 291

COMMISSIONS:

Of broker, see BROKERS.

COMMON CARRIERS:

See CARRIERS.

COMMUNITY DEBT:

See HUSBAND AND WIFE, 5, 6.

COMMUNITY PROPERTY:

See HUSBAND AND WIFE, 2.
Assets in bankruptcy, see BANKRUPTCY, 1.

COMPENSATION:

Of broker, see BROKERS.
For property taken or damaged for public use, see EMINENT DOMAIN, 5-13.
Award of to injured employee, by industrial insurance commission, see MASTER AND SERVANT, 8.

COMPETENCY:

Of evidence in civil actions, see EVIDENCE.
Of experts as witnesses, see EVIDENCE, 5.
Of witnesses in general, see WITNESSES, 1-3, 5.

COMPLAINT:

In criminal prosecutions, see INDICTMENT AND INFORMATION.
In civil actions, see PLEADING, 1, 3, 4, 6.
Failure of plaintiff to make outcry, see RAPE, 2.

COMPROMISE AND SETTLEMENT:

Evidence of offer of compromise, see EVIDENCE, 2.
Power of city to compromise invalid claims for damages, see MUNICIPAL CORPORATIONS, 28.
Of claim for personal injuries, see RELEASE.

CONCLUSION:

Of witness, see EVIDENCE, 5.

CONCLUSIVENESS:

Of judgment as to amount of assessment for benefits from drainage district, see DRAINS, 1.
Of decision of city to condemn property, see EMINENT DOMAIN, 3.
Of judgment, see JUDGMENT, 2, 3.
Of declaration in ordinance as to question of benefits to property from public improvement, see MUNICIPAL CORPORATIONS, 6.
Of award and judgment in condemnation proceedings, see MUNICIPAL CORPORATIONS, 9, 10.
Of decision of arbitrator of disputes under railroad construction contract, see RAILROADS, 6.

CONDEMNATION:

Taking or damaging property for public use, see EMINENT DOMAIN

CONDITION:

Precedent to foreclosure of laborer's lien, see EXECUTORS AND ADMINISTRATORS, 3, 4.

Condition subsequent for benefit of lessor, see LANDLORD AND TENANT, 1.

CONDITIONAL SALES:

See SALES, 7, 8.

CONDUCT:

Of judge as harmless error, see APPEAL AND ERROR, 28.

Of counsel as harmless error, see APPEAL AND ERROR, 28.

Of judge at civil trial, see TRIAL, 1.

CONSIDERATION:

For extension of time for payment of note, see BILLS AND NOTES, 4.

For modification of contract, see CONTRACTS.

Of suretyship, see PRINCIPAL AND SURETY, 1.

Of release, see RELEASE.

CONSTITUTIONAL LAW:

Laws empowering public service commission to fix time for furnishing cars and provide penalty to be paid shippers for delay as delegation of legislative powers, see CARRIERS, 1.

Regulation of interstate commerce, see COMMERCE.

Oil inspection fee as violating prohibition against imposts or duties on imports or exports, see CUSTOMS DUTIES.

Supplemental assessment for drainage district as impairing vested rights, see DRAINS, 2.

Uniformity of taxation, see LICENSES, 1, 4.

Apportionment of expense of safety appliances at crossings as taking of property without due process of law, see RAILROADS, 3.

Subjects and titles of statutes, see STATUTES, 1.

1. CONSTITUTIONAL LAW — POWER OF COURTS. The courts cannot look to the purpose or motive prompting legislative action to restrain the enforcement of a law that is not unconstitutional, even though it may be unjust or unreasonable. *Standard Oil Co. v. Graves*.... 291

2. CONSTITUTIONAL LAW—FREEDOM OF SPEECH. The provision of the Federal constitutional amendment that Congress shall make no law abridging the freedom of speech or of the press is only a limitation upon the power of Congress, and does not apply to state laws. *State v. Haffer* 136

3. SAME—FREEDOM OF SPEECH—LIBEL. Const., art. 1, § 5, providing that every person may freely speak or write on all subjects, "being responsible for the abuse of that right," does not give the right to maliciously defame the memory of a deceased person, or render void Rem. Code, § 2424, making such defamation criminal libel. *State v. Haffer* 136

CONSTITUTIONAL LAW—CONTINUED.

4. CONSTITUTIONAL LAW—PRIVILEGES AND IMMUNITIES—DUE PROCESS OF LAW. Rem. Code, § 6051 *et seq.*, levying a remunerative inspection tax on all oils and gasoline "before being sold or offered for sale" does not impinge the fourteenth amendment to the Federal Constitution prohibiting the abridgement of privileges and immunities of citizens or the taking of property without due process of law or the state Const., art. 1, § 3, providing for due process of law. *Standard Oil Co. v. Graves* 291

5. CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—WORKMEN'S COMPENSATION ACT—ABOLITION OF CIVIL REMEDIES—POWERS OF CITY. It is not a denial of the equal protection of the laws to abolish civil actions for personal injuries sustained by city employees in the course of their employment and relegate them to provisions made for them by the city, although the different cities of the state may make different provisions, so long as the provisions made are substantial and not merely nominal; the Federal and state constitutions as to equal protection of the laws requiring only that the laws be general in their application within the territory in which they operate. *State ex rel. Fletcher v. Carroll* 531

CONSTRUCTION:

Of statute relating to negotiability of notes, see BILLS AND NOTES, 1, 2.
Of statute empowering public service commission to fix penalty for delay in furnishing cars to shippers, see CARRIERS, 4, 5.
Of statute giving right of action for wrongful death, see DEATH.
Of statute providing for disposition of fines for breaches of penal laws, see FINES.
Of statute relating to homesteads, see HOMESTEADS, 1, 2.
Of statute prohibiting manufacturer to own interest in retail liquor business, see INTOXICATING LIQUORS.
Of statutes defining defamation of deceased person, see LIBEL AND SLANDER, 2, 3.
Of workmen's compensation act, see MASTER AND SERVANT, 8, 9.
Of statute requiring permit and bond for operation of motor vehicles for hire in cities of first class, see MUNICIPAL CORPORATIONS, 14.
Of cropping contract, see PARTNERSHIP.
Of contract for grubbing right of way, see RAILROADS, 5, 6.
Of statutes in general, see STATUTES, 3. 4.

CONTEMPT:

1. CONTEMPT—WHAT CONSTITUTES. To circulate a pamphlet in the court room reflecting upon the trial judge and to interrupt the proceedings in an insolent manner constitutes contempt of court in the view and presence of the court, under Rem. Code, § 1049. *In re Willis* 180

2. SAME — SUMMARY JUDGMENT — JURISDICTION — DELAY IN ENTRY. Jurisdiction attaches immediately to punish for a contempt com-

CONTEMPT—CONTINUED.

mitted in the view and presence of the court; and where the offender left the room before he could be apprehended by the sheriff, and was brought into court the next day, a delay of one day in entering the order is not unreasonable or sufficient to divest the court of jurisdiction. *In re Willis*..... 180

3. SAME — SUMMARY JUDGMENT — NECESSITY OF HEARING. Where a contempt is committed in the view and presence of the court, summary punishment without a hearing, as authorized by Rem. Code, § 1051, violates no constitutional rights. *In re Willis*..... 180

4. SAME—SENTENCE — EXCESSIVE PUNISHMENT. For a contempt of court committed by an attorney by circulating a pamphlet reflecting on the trial judge while the court was in session and by repeatedly interrupting the proceedings, punishment by a fine of $300 and three months' imprisonment in the county jail is excessive, and should be reduced to $100 and 24 hours in jail. *In re Willis*..... 180

5. CONTEMPT—APPEAL—REVIEW—RECITALS—PRESUMPTIONS. Upon appeal from a judgment of contempt of court committed in the presence of the court, the facts recited in the judgment are taken as true. *In re Willis*..... 180

CONTINUANCE:

After trial amendment, see APPEAL AND ERROR, 20.

CONTRACTORS:

On public work, see MUNICIPAL CORPORATIONS, 1-5.
On railroad work, see RAILROADS, 7, 8.

CONTRACTS:

See BILLS AND NOTES; JOINT ADVENTURES; SALES.
Action in contract or tort, joinder of, see ACTION.
For broker's commission, see BROKERS.
Agreements within statute of frauds, see FRAUDS, STATUTE OF.
Leases, see LANDLORD AND TENANT.
Maritime contracts, see MECHANICS' LIENS, 2.
As waiving right to claim lien, see MECHANICS' LIENS, 7.
For prospecting for oils, see MINES AND MINERALS, 4, 5.
For public improvements, see MUNICIPAL CORPORATIONS, 1-3.
Cropping contracts, construction, see PARTNERSHIP.
Suretyship, see PRINCIPAL AND SURETY.
For railroad construction work, see RAILROADS, 5-8.
Releasing claim for personal injuries, see RELEASE.
Specific performance, see SPECIFIC PERFORMANCE.

1. CONTRACTS—MODIFICATION — CONSIDERATION. The substitution of a new contract for an old one containing inconsistent terms, rescinds the old one and constitutes a sufficient consideration for the new contract. *Bader v. Moore Building Co*..... 221

CONTRADICTION:

Of witness, see WITNESSES, 6.

CONTRIBUTORY NEGLIGENCE:

Of servant, see MASTER AND SERVANT, 10.
Of person injured on street, see MUNICIPAL CORPORATIONS, 23-27.
Of owner of stock killed by railroad, see RAILROADS, 10.

CONVERSATION:

Examination of witness as to, responsiveness of answer, see WITNESSES, 4.

CONVEYANCES:

See HUSBAND AND WIFE, 2-4; MORTGAGES.
In fraud of creditors, see FRAUDULENT CONVEYANCES.

CORPORATIONS:

See MUNICIPAL CORPORATIONS.
Condemnation of property previously devoted to public use, see EMINENT DOMAIN, 1.

1. CORPORATIONS—SOLVENCY. The test of the insolvency of a corporation is its inability to pay its debts in due course of business. *Ronald v. Schoenfeld* 238

2. CORPORATIONS—INSOLVENCY—ASSETS — OWNERSHIP OF STOCK—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY. In a trustee's action against a stockholder to recover assets of an insolvent corporation, the burden is upon the stockholder to prove by clear and convincing evidence that he held the stock as collateral security; and his oral testimony, corroborated by witnesses hostile to the corporation, to the effect that his note for $2,000 was given by him as a loan to the corporation instead of as payment for the stock, is not sufficient to overcome the presumption and the written records of the corporation that the stock was owned by him. *Ronald v. Schoenfeld*..... 238

3. SAME—INSOLVENCY—ASSETS—RECOVERY—LIMITATIONS. A trustee in bankruptcy, endeavoring to assemble the assets of an insolvent corporation for the benefit of creditors, is not affected by laches of the officers of the corporation in bringing suit on a claim against a stockholder, but may sue at any time within the period of the statute of limitations. *Ronald v. Schoenfeld*..... 238

4. SAME—INSOLVENCY — OFFICERS — PREFERENCES — NOTICE OF CONDITION. Knowledge of an insolvent condition is imputed to an officer of a corporation, and he cannot profit at the expense of other creditors by having an auto truck turned over to himself in payment of a loan which he made to the company while the company was insolvent. *Ronald v. Schoenfeld*..... 238

CORPORATIONS—CONTINUED.

5. CORPORATIONS—INSOLVENCY—PREFERENCES — CHANGE IN SECURITIES —TRUST FUND DOCTRINE. Where a creditor of insolvent corporations had a first and prior lien against their real estate for work and labor performed in the construction of a drainage ditch, and dismissed his action for foreclosure of the lien in consideration of a mortgage upon the property, equity, regarding the substance rather than the form, will not hold the mortgage an unlawful preference by an insolvent corporation over other unsecured creditors; since the mortgage did not modify or change the relation of the parties to the disadvantage of creditors, and the trust fund doctrine does not apply. *Lloyd v. Sichler*..... 611

CORROBORATION:

Of female in civil action for rape, see RAPE, 4.
Of testimony of accused after impeachment, see WITNESSES, 6.

COSTS:

Of installing and maintaining safety devices at railroad crossings, see RAILROADS, 1-4.

1. COSTS—ITEMS RECOVERABLE—PREMIUM ON BOND. A premium paid on a replevin bond furnished by plaintiff is recoverable as "costs and disbursements" in the action, under Rem. Code, § 6059-194, providing that in all actions the party entitled to recover costs may include such reasonable sum as may have been paid a surety company for executing or guaranteeing any bond, as may be allowed by the court. *Stilwell Brothers, Incorporated, v. Union Machinery & Supply Co.* 61

2. COSTS—TIME FOR TAXATION—DATE OF JUDGMENT. Rem. Code, § 482, requiring a cost bill to be served and filed "within ten days after the judgment," has reference to the time when final judgment is filed with the clerk, and not to the time it is signed by the judge. *Thompson v. Seattle Park Co*..... 539

3. COSTS—ON APPEAL—PREVAILING PARTY—ABIDING RESULT. Where a case is reversed for new trial for error that was partly the fault of appellant, it is inadvertent to award him the costs of the appeal; nor can they be awarded to the respondent, in view of Rem. Code, § 1744, which provides that, when a new trial is ordered, the court may in its discretion direct that costs of the prevailing party shall abide the result of the action; which should be the order in such a case. *Phoenix Assurance Co. v. Columbia & Puget Sound R. Co.* 323

COUNTERCLAIM:

See SET-OFF AND COUNTERCLAIM.

COUNTIES:

Negligence in maintenance of highway, see HIGHWAYS.

COURTS:

Review of decisions, see APPEAL AND ERROR.
Powers of lower court after remand on appeal, see APPEAL AND ERROR, 39.
Power to question purpose or motive prompting legislative action, see CONSTITUTIONAL LAW, 1.
Contempt of court, see CONTEMPT.
Power to correct judgment inadvertently entered, see JUDGMENT, 1.
Jurisdiction of action to foreclose lien for construction of vessel, see MECHANICS' LIENS, 1, 2.
Province of court and jury, see TRIAL, 5.

1. COURTS—RULE OF DECISION—FEDERAL QUESTION. The decisions of the United States supreme court are controlling on the question whether oil sought to be subjected to an inspection tax was then an article of interstate commerce. *Standard Oil Co. v. Graves*..... 291

2. COURTS—DECISIONS OF FEDERAL COURTS — WORKMEN'S COMPENSATION ACT. The right to maintain an action in the state court under the workmen's compensation act is a state question upon which a decision of a Federal district court is not controlling in the state courts. *Shaughnessy v. Northland Steamship Co*..... 325

COVENANTS:

In leases, see LANDLORD AND TENANT, 1.

CREDITORS:

Of insolvent corporation, see CORPORATIONS, 4, 5.
Conveyances in fraud of, see FRAUDULENT CONVEYANCES.
Rights under conditional sales contracts, see SALES, 8.

CRIMINAL LAW:

See CONTEMPT; EMBEZZLEMENT; GAMING; HOMICIDE; LARCENY; LIBEL AND SLANDER; RECEIVING STOLEN GOODS.
Extradition of persons accused, see EXTRADITION.
Disposition of fines, see FINES.
Indictment, information, or complaint, see INDICTMENT AND INFORMATION.
Violation of ordinance regulating sale of goods by weight or measure, see WEIGHTS AND MEASURES.
Testimony of witness at criminal trial, see WITNESSES, 5, 6.

1. CRIMINAL LAW—ABATEMENT OF ACTION—DEATH. A criminal action abates on the death of the accused pending appeal, in the absence of any statute on the subject. *State v. Banks*..... 237

2. CRIMINAL LAW—ACCESSORIES—INSTRUCTIONS. In a prosecution for being an accessory to a larceny, it is proper to instruct that when one who, with intent to incite another to commit a crime, intentionally signifies to that other his assent, and the other as a result of such incitement does commit it, the first person aids and abets;

BUILDINGS:

Readjustment of by owner in contemplation of second condemnation, see EMINENT DOMAIN, 8.

BURDEN OF PROOF:

On stockholder to show holding of stock as collateral security, see CORPORATIONS, 2.

To show fraud, see FRAUDULENT CONVEYANCES.

To overcome recitals in judgment, see JUDGMENT, 2.

To show negligence of master, see MASTER AND SERVANT, 11.

CANCELLATION OF INSTRUMENTS:

Oral rescission of option for sale of real estate, see FRAUDS, STATUTE OF, 1.

Termination of lease, see LANDLORD AND TENANT, 1, 4, 5.

CANDIDATES:

For office, see ELECTIONS.

CANVASSING BOARDS:

Powers of for irrigation district election, see ELECTIONS, 1.

CARRIERS:

Right to claim lien for cartage of materials furnished for vessel, see MECHANICS' LIENS, 8, 9.

1. CARRIERS—REGULATION — RECIPROCAL DEMURRAGE—CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWERS. Since reciprocal demurrage charges for delay in failing to furnish a shipper with cars, after demand, though called a penalty, is remedial redress, administrative in its essence and incidental to administrative functions, and since the constitutional division of governmental powers into three separate departments applies only in a limited sense and does not restrict one set of officers to one department exclusively, Rem. Code, §§ 8626-59, 8626-85, empowering the public service commission to fix the time for furnishing cars and provide the penalty to be paid shippers for delays, is not unconstitutional as an unlawful delegation of legislative powers, in contravention of Const., art. 2, § 1; sections 8626-10 and 8626-11, having imposed in express terms the duty to promptly furnish cars. *State ex rel. Chicago, Milwaukee & St. Paul R. Co. v. Public Service Commission*..... 274

2. SAME. Though judicial power may be conferred by the legislature upon the public service commission, that body cannot assume the legislative function and confer such power upon itself; hence the public service commission cannot, under authority to adopt rules governing reciprocal demurrage charges for failure to furnish cars, adopt a rule providing that, when any dispute or controversy arises between shipper and carrier with reference to the application of the rules for demurrage, a complaint shall be filed with the commission

CRIMINAL LAW—CONTINUED.

9. SAME—JUDGMENT—NAME OF OFFENSE. A judgment finding the accused guilty of an offense erroneously designated as "conducting gambling," is not invalid, where it appears from the recitals and record that the accused was charged with a specific offense and that the jury returned a verdict of guilty of that offense, and that he was adjudged guilty and sentenced upon the verdict. *State v. Moser* 465

10. CRIMINAL LAW—APPEAL—DUTY TO PROSECUTE—DILIGENCE. It is the duty of defendant appealing from a conviction in justice court to diligently prosecute his appeal; and a delay of over five months after perfecting the appeal, with no excuse shown, warrants a dismissal of the appeal for want of diligence. *State v. Buffum*.... 25

11. CRIMINAL LAW—APPEAL—APPEAL BY STATE—ARREST OF JUDGMENT. Rem. Code, § 1716, subd. 7, expressly confers upon the state the right to appeal from an order granting a motion in arrest of judgment. *State v. Martin*..... 313

12. CRIMINAL LAW—APPEAL — REVIEW — VERDICT. Where there was substantial evidence to support every material fact necessary to sustain a verdict of guilty, and the trial court has refused to interfere, the verdict is conclusive on appeal. *State v. Lance*..... 484

13. CRIMINAL LAW—APPEAL—INSTRUCTIONS—REASONABLE DOUBT. An instruction upon the subject of reasonable doubt to the effect that the jury could take into consideration the strong probabilities of the case, while subject to criticism standing alone, is not prejudicial when, taken with its context, it could not have misled the jury. *State v. Lance*..... 484

14. SAME—TRIAL—INSTRUCTIONS. It is proper to instruct the jury to disregard any statements made by counsel concerning the evidence, unless they found the statement to be borne out by the evidence. *State v. Lance*..... 484

15. CRIMINAL LAW—APPEAL—HARMLESS ERROR. A refusal of a motion under Rem. Code, § 2101, to have an information "set aside" because it was not verified, is error without prejudice, where the court properly permitted an amended and verified information to be filed. *State v. Haffer*..... 136

16. CRIMINAL LAW — APPEAL — HARMLESS ERROR. One convicted of manslaughter through the sale of unbranded poison cannot move in arrest of judgment on the ground that he was guilty of murder in having sold it knowing that the deceased would drink it without knowledge of its poisonous quality. *State v. Takano*..... 119

17. CRIMINAL LAW—DEGREES OF OFFENSE—HARMLESS ERROR—INSTRUCTIONS. In a prosecution for manslaughter through the selling of

CRIMINAL LAW—CONTINUED.

unbranded poison, in violation of Rem. Code, § 2507, it is not prejudicial error to instruct that one violating the act would be guilty of a misdemeanor. *State v. Takano* 119

CROPS:

Construction of cropping contract, see PARTNERSHIP.
Appointment of receiver to take charge of, see RECEIVERS, 1.

CROSS-APPEALS:

Time for taking, see APPEAL AND ERROR, 6.

CROSS-EXAMINATION:

Of witness, see WITNESSES, 4.

CROSSINGS:

Accident at street crossing, see MUNICIPAL CORPORATIONS, 19, 21, 22, 27.
Cost of construction and maintenance, see RAILROADS, 1-4.
Collision between taxicab and street car at street crossing, see STREET RAILROADS, 2.

CUSTOMS AND USAGES:

Evidence as to customary amount of overhead expense in business, see JOINT ADVENTURES, 3.

CUSTOMS DUTIES:

1. CUSTOMS DUTIES—CONSTITUTIONAL RESTRICTIONS—INTERSTATE COMMERCE—OIL INSPECTION FEES. Rem. Code, § 6051 *et seq.*, exacting a remunerative inspection fee for the inspection of oils coming from another state into this state for sale, does not violate U. S. Const., art. 1, § 10, cl. 2, providing that no state shall, without the consent of Congress, "lay any imposts or duties on imports or exports, except what may be absolutely necessary for execution of its inspection laws;" since this does not refer to articles carried from one state to another, but only to foreign importations. *Standard Oil Co. v. Graves* 291

2. SAME. The act does not violate U. S. Const., art. 1, § 9, cl. 5, providing that "no tax or duty shall be laid on articles exported from any state," as this relates only to exportations to foreign countries. *Standard Oil Co. v. Graves* 291

DAMAGES:

For wrongful death, see DEATH.
Compensation for property taken or damaged for public use, see EMINENT DOMAIN, 5-13.
Estoppel to claim damages, see ESTOPPEL, 1.
For refusal of mortgagee to discharge mortgage after satisfaction, see MORTGAGES, 1, 4, 5.

DAMAGES—CONTINUED.

Power of city to compromise invalid claims for, see MUNICIPAL CORPORATIONS, 28.
Mistake in pleading measure of damages, see PLEADING.
In civil action for rape, see RAPE, 5, 10.
Release of damages for personal injuries, see RELEASE.
Breach of contract for sale of goods, see SALES, 5, 6.
Assessment of for failure to discharge satisfied mortgage as question for court, see TRIAL, 5.

DEATH:

As cause of abatement of criminal action, see CRIMINAL LAW, 1.

1. DEATH—WRONGFUL DEATH—STATUTES—CONSTRUCTION. Rem. Code, § 183 giving a right of action for wrongful death, being in derogation of the common law, is to be strictly construed in determining the persons entitled to sue, but liberally in applying the statute in their favor. *Whittlesey v. Seattle*..... 645

2. SAME—WRONGFUL DEATH — ACTIONS — PERSONS ENTITLED — STATUTES—CONSTRUCTION. No right of action for wrongful death is given in favor of surviving children for the death of their mother, by Rem. Code, § 183, which provides that the widow or children of a man killed in a duel shall have a right of action therefor; that, when the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action therefor; that, if the deceased leave no widow or issue, then his parents, sisters or minor brothers dependent upon him for support may maintain the action; that, when the death is caused by falling through an opening in any sidewalk, etc., his heirs or personal representatives, or if deceased leaves no widow or issue, then his parents, sisters or minor brothers dependent upon him for support, may maintain the action; and this, notwithstanding Id., § 148 providing that in the construction of the code, words importing the masculine gender may be extended to females also; since in each case, the words "man," "person" or "deceased" is used in contradistinction to the word "widow" and other descriptive words indicating an intent to compensate for the loss of the husband upon the theory of dependence upon him for support, without any provision for the death of wife or mother; and since the courts cannot read the word "widower" for "widow." *Whittlesey v. Seattle*..... 645

3. DEATH—WRONGFUL DEATH—STATUTES—CODE—ADOPTION. The code of 1881, which includes the wrongful death act rewritten as an independent enactment, having been duly passed as appears from the council and house journals although no mention thereof was made in the session laws of 1881, it cannot be argued that the various subdivisions of the wrongful death act are separate enactments erroneously arranged or combined by the compiler of the code as one act. *Whittlesey v. Seattle*..... 645

DEBT:

Separate or community debts, see HUSBAND AND WIFE, 5, 6.

DEBTOR AND CREDITOR:

See BANKRUPTCY; FRAUDULENT CONVEYANCES.

DECEDENTS:

Estates, see EXECUTORS AND ADMINISTRATORS.
Defamation of deceased person, see LIBEL AND SLANDER.
Testimony as to transactions with, see WITNESSES, 2, 3.

DECISION:

On appeal, see APPEAL AND ERROR, 18, 38.
Decisions of Federal courts, see COURTS.
Of legislative body of city to condemn property, finality, see EMINENT DOMAIN, 3.
Of industrial insurance commission, right of review, see MASTER AND SERVANT, 8.
Of arbitrator of disputes under railroad construction contract, see RAILROADS, 6.

DEEDS:

Mortgage deed as affecting lien of judgments against grantors, see JUDGMENT, 4.
Of trust, see MORTGAGES, 1-3.

DEFAMATION:

Of deceased person, see LIBEL AND SLANDER.

DEFECT:

In city street, see MUNICIPAL CORPORATIONS, 18, 20, 23, 24.

DEFICIENCY:

On foreclosure of mechanics' lien, see MECHANICS' LIENS, 12.
Payment of under specific legacy, see WILLS, 2.

DEFINITENESS:

Of verdict, see CRIMINAL LAW, 8.

DEGREES:

Instructions as to lesser degree of assault, see CRIMINAL LAW, 7.

DELAY:

Demurrage charges to be paid shipper for delay in furnishing cars, see CARRIERS, 1-5.
In entry of judgment, see CONTEMPT, 2.
In taking appeal from conviction in justice court, see CRIMINAL LAW, 10.

DELEGATION:

Of legislative powers to public service commission, see CARRIERS, 1.
Of legislative powers to industrial insurance commission, see MASTER AND SERVANT, 6.

DELIVERY:

To client of money or papers received by attorney in course of employment, see ATTORNEY AND CLIENT.
Of note without indorsement, effect, see BILLS AND NOTES, 3.
As waiver of claim for lien, see MECHANICS' LIENS, 8.

DEMAND NOTES:

See BILLS AND NOTES, 2.

DEMURRAGE:

Reciprocal demurrage for failure to furnish cars to shippers, see CARRIERS, 1-5.

DENIALS:

In pleading, see PLEADING, 2.

DEPARTURE:

In pleading, see PLEADING, 3.

DESCRIPTION:

Of property in contract as affecting right to specific performance, see SPECIFIC PERFORMANCE, 1.

DESIGNATION:

Of action in complaint, see PLEADING, 1.

DILIGENCE:

In prosecuting appeal from conviction in justice court, see CRIMINAL LAW, 10.

DISCHARGE:

Refusal of mortgagee to discharge satisfied mortgage, see MORTGAGES, 1-5.
From liability as surety, see PRINCIPAL AND SURETY, 2-4.
Of receiver, compelling payment of claim after exhausting estate, see RECEIVERS, 2.
Of claim for personal injuries, see RELEASE.
Of jury in equitable action, see TRIAL, 8.

DISCRETION:

Of industrial insurance commission in awarding compensation to injured employee, see MASTER AND SERVANT, 8.

DISCRETION OF COURT:

Review of, see APPEAL AND ERROR, 27, 28.
As to qualification of expert, see EVIDENCE, 5.
Trial amendment of pleading, see PLEADING, 4.
Limiting number of witnesses at trial, see TRIAL, 2.

DISMISSAL AND NONSUIT:

Waiver of nonsuit, see APPEAL AND ERROR, 16.
Dismissal of criminal charge, see CRIMINAL LAW, 8.
Dismissal of criminal appeal for delay, see CRIMINAL LAW, 10.

DISPOSITION:

Of fines for breaches of penal laws, see FINES.

DISTRICTS:

Drainage districts, see DRAINS.
Irrigation districts, election of officers, see ELECTIONS.

DUPLICITY:

In information, see INDICTMENT AND INFORMATION.

DRAINS:

Condemnation for right of way for drainage ditch, see EMINENT DOMAIN, 6, 7.

1. DRAINS—ASSESSMENTS—CONCLUSIVENESS—REASSESSMENTS — JUDGMENT—RES JUDICATA—MATTERS CONCLUDED. Under Rem. & Bal. Code, § 4137, providing that the jury in proceedings to establish a drainage system, shall ascertain the maximum amount of benefits to be derived by each landowner, the finding of the jury is conclusive that the property was not benefited to a greater extent; and a judgment showing that the full amount of the original assessment was collected is *res adjudicata* and a bar to a proceeding for a supplemental assessment to cover a deficiency, the improvement having cost more than the original estimate, and more than the amount of the award of the jury. *Poolman v. Langdon*..... 448

2. SAME — ASSESSMENTS — REASSESSMENTS — STATUTES — VESTED RIGHTS. Rem. & Bal. Code, § 4155, authorizing a supplemental assessment for a drainage district where the amount realized from the original assessment did not prove sufficient to complete the drainage system, merely authorizes a supplemental assessment for the cost of constructing the original improvement, if the amount of the deficiency plus the amount of the original assessment does not exceed the amount of the maximum benefits fixed by the jury; since it would be unconstitutional as impairing vested rights if construed to authorize an assessment in excess of the maximum benefits as fixed by the jury. *Poolman v. Langdon*..... 448

DUE PROCESS OF LAW:

Oil inspection tax as taking of property without due process of law, see CONSTITUTIONAL LAW, 4.

EJECTMENT:

Judgment as bar to subsequent action to establish boundary line, see JUDGMENT, 3.

1. EJECTMENT—TRIAL—VERDICT—SUFFICIENCY. In an action of ejectment between adjoining landowners, a general verdict merely finding for the plaintiff is defective in that it does not comply with Rem. Code, § 795, requiring the jury, if their verdict be for the plaintiff, to find that he is entitled to possession of the property described in the complaint, and the nature and duration of his estate. *Weidlich v. Independent Asphalt Paving Co.*..... 395

ELECTION:

Between counts in information, see INDICTMENT AND INFORMATION.

ELECTIONS:

1. ELECTIONS—CANVASSING BOARDS — POWERS — RETURNS — STATUTES. Under Rem. Code, § 6424, imposing upon a canvassing board for an irrigation district election the usual duties of such boards to open the returns, estimate the vote, and declare the result, the board has no power to go behind the return certified by the election officers and examine the ballots. *Edes v. Haley*..... 232

2. SAME—BALLOTS—VALIDITY—CERTAINTY. Where two officers were to be elected in an irrigation district, one for a short term and one for a long term, and the ballots failed to designate the term of office for which the several candidates were nominated, the election is void for uncertainty, and evidence cannot be taken to show the intent of the voters. *Edes v. Haley*..... 232

EMBEZZLEMENT:

1. EMBEZZLEMENT — BY AGENT — DEFENSES — APPROPRIATION UNDER CLAIM OF TITLE—INSTRUCTIONS—STATUTES. Upon a prosecution of a broker for larceny by embezzlement in withholding, as agent of the purchaser, part of the purchase price which he had deducted as his commission, in which there was conflicting evidence as to defendant's misrepresentations and as to the fact of agency, the defendant is entitled to an instruction to the jury in accordance with Rem. Code, § 2608, which provides that it shall be a sufficient defense to a prosecution for larceny that the property was appropriated openly and avowedly under a claim of title preferred in good faith, even though the claim is untenable. *State v. Rolette*..... 94

2. EMBEZZLEMENT — EVIDENCE — ADMISSIBILITY — SUFFICIENCY. In a prosecution for embezzling the moneys of a lodge, in which there

EMBEZZLEMENT—CONTINUED.

was evidence that a bank account was an account kept by the accused of moneys belonging to the lodge, the statement of the bank account is competent to show the condition of the fund, and it was for the jury to determine whether the fund belonged to the lodge. *State v. Knowles*..... 351

EMINENT DOMAIN:

Public improvements by municipalities, see MUNICIPAL CORPORATIONS, 1-8, 11-13.

1. EMINENT DOMAIN—PROPERTY PREVIOUSLY DEVOTED TO PUBLIC USE —PUBLIC NECESSITY—EVIDENCE—SUFFICIENCY. The property and riparian rights held and used by a public service corporation for the purpose of furnishing water to a city, and necessary for its present and future use, cannot be condemned by another public service corporation to be devoted to the same use to which the company already in business intends to devote it, where the public interest does not require it; and public necessity therefor is not sufficiently shown, where it appears that the first company is a going concern, is furnishing an adequate supply of water to the city, and will very soon require an increase and it is its intention to use its property not now actually devoted to a public use, for that purpose, holding the same in reasonable anticipation of future needs. *State ex rel. South Fork Log Driving Co. v. Superior Court*..... 691

2. EMINENT DOMAIN— PURPOSES — STREETS — TERMINI — LEGISLATIVE QUESTION. Condemnation for a public street cannot be objected to on the ground that the street terminates at a privately owned pier, since the location, route and termini are purely legislative questions beyond the control of the court. *In re Yesler Way, Seattle*..... 427

3. SAME—BY CITY—DECISION TO CONDEMN—FINALITY. The decision of the legislative body of a city to condemn property, in a proper case, is final and cannot be reviewed by the court. *In re Yesler Way, Seattle* 427

4. SAME—AUTHORITY — PURPOSES — "BRIDGES," "VIADUCTS" AND "APPROACHES"—STATUTES. A city having power to construct bridges and viaducts under Rem. & Bal. Code, § 7507, and to take and damage property for bridges and approaches under Id., § 7768, it may condemn the right to impose upon a street, already permanently improved, an overhead crossing reached by an inclined plane, extending partly over the street and partly over the sidewalk; since the same may properly be called either a bridge or a viaduct and the inclined plane is an "approach." *In re Yesler Way, Seattle*.... 427

5. EMINENT DOMAIN—PAYMENT OF COMPENSATION — APPROPRIATION— NECESSITY—STATUTES. A specific appropriation by the legislature to pay awards in condemnation proceedings is not contemplated or necessary to authorize the state auditor to issue a warrant therefor,

EMINENT DOMAIN—CONTINUED.

under the eminent domain act of 1891, entitled an act to regulate the mode of appropriating land and prescribing the method of making compensation, which provides (Rem. Code, §§ 896, 897) that the decree of appropriation shall vest legal title in the state, that the decree shall be recorded and that the state may make payment of the damages by depositing the same in court; especially in view of Id., § 900, providing for the payment of awards by the issuance of state warrants; since it is no defense to an action to secure a warrant that a special fund provided for the payment of awards had been exhausted. *State ex rel. Peel v. Clausen*..... 166

6. EMINENT DOMAIN—COMPENSATION—RIGHT OF WAY — MEASURE OF DAMAGES. In proceedings to condemn a right of way for a drainage ditch, in which the damages were assessed after the work had been constructed, the measure of damages is the value of the property taken, together with all damages to the remainder, whether traceable to proper or negligent construction, regardless of the location of the property, from which is to be deducted the special benefits to the remaining property. *Yakima County v. Olson*..... 579

7. SAME—DAMAGES—EVIDENCE — ADMISSIBILITY. In proceedings to assess the damages for the condemnation of a right of way for a drainage ditch, evidence as to the maintenance of a railway fill that affects only a third party should be excluded as confusing the issue. *Yakima County v. Olson*..... 579

8. EMINENT DOMAIN—COMPENSATION—DAMAGES—READJUSTING BUILDINGS—REDUCING EXPENSE. Under a liberal construction of the constitutional provision requiring payment for private property taken for public use, and the general rule requiring one who is damaged to do what he can to minimize his damages, a property owner may recover damages in eminent domain proceedings to cover the cost of readjusting its buildings in contemplation of a second condemnation, where, after a condemnation to raise water in a canal to a seven-foot level, it was known that the government would raise the water two feet further and another condemnation therefor would be necessary; and a readjustment of the buildings to the seven-foot level by one operation, and afterwards to the nine-foot level, would have doubled the expense; since the property owner was not proceeding voluntarily to readjust its property and was in duty bound to minimize the damages, and the rule limiting damages to the value of the property at the time of the trial would not be just. *King County v. Seattle Cedar Lumber Mfg. Co*..... 84

9. EMINENT DOMAIN — COMPENSATION — APPORTIONMENT BETWEEN MORTGAGOR AND MORTGAGEE. Where the state condemned land for a state road, without making the mortgagees parties as it might have done, and an award was entered in favor of the owners, the state must pay the award to the owners before taking possession, notwith-

EMINENT DOMAIN—CONTINUED.

standing the fact that the mortgagee had purchased at a subsequent foreclosure sale and had quitclaimed to the state, subject to redemption; since the award, unappealed from, is conclusive on the subject of title, as between the parties, and the question of apportionment between mortgagor and mortgagee is immaterial. *State ex rel. Peel v. Clausen* 166

10. SAME—COMPENSATION—PAYMENT — STATUTES. Rem. Code, § 5872, providing that the cost of a right of way for a state road acquired by the highway commission shall be paid for from the fund apportioned to such state road does not make that method exclusive, or repeal the provisions of the general eminent domain act which applies where the road fund has been exhausted and the state had taken possession of land and put it to a public use without making compensation. *State ex rel. Peel v. Clausen*..... 166

11. SAME—PAYMENT OF COMPENSATION—PROCEEDINGS—STATUTES—LIABILITY OF STATE ON TAKING POSSESSION. Rem. Code, § 900, providing that in eminent domain proceedings the attorney general "shall" file with the state auditor a certificate setting forth the amount of the award against the state, and making it the duty of the auditor to draw a warrant therefor, leaves it discretionary with the attorney general to file the certificate, as the state may abandon the proceedings before taking possession if the award is unsatisfactory; hence § 900 does not conflict with the earlier act, Id., § 889, providing that no execution shall issue against the state on any judgment. *State ex rel. Peel v. Clausen*..... 166

12. SAME—PAYMENT OF COMPENSATION—PROCEEDINGS — PARTIES. The state having taken possession of lands before paying the award, and refused to avail itself of Rem. Code, § 900, authorizing an abandonment of the proceedings, it cannot escape liability for the amount of the award, and the attorney general is therefore not a necessary party to a proceeding to compel the state auditor to issue a warrant for the amount due, which under § 900 he was to issue upon the attorney general's certificate. *State ex rel. Peel v. Clausen*.... 166

13. SAME—PROCEEDINGS—PLEADING AND PROOF. Where the state took possession of condemned lands before paying the award, in violation of Const., art. 1, § 16, requiring compensation to be first made, the law presumes that the state is prepared to pay the award, and the burden is not upon the claimant to allege or prove the state of the public fund. *State ex rel. Peel v. Clausen*..... 166

EMPLOYEES:

See MASTER AND SERVANT.

ENTRY:

Of judgment in contempt proceedings, see CONTEMPT, 2.
Of judgment, see JUDGMENT, 1.

EQUITY:

See SPECIFIC PERFORMANCE.
Equitable estoppel, see ESTOPPEL.
Trial of equitable action, see TRIAL, 8.

ESTABLISHMENT:

Of boundary, see BOUNDARIES.
Of drainage district, reassessments, see DRAINS.

ESTATES:

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.
Created by will, see WILLS.

ESTOPPEL:

By judgment, see JUDGMENT, 3.
To claim lien, see MECHANICS' LIENS, 5.

1. ESTOPPEL—SELLER — CONDITIONAL TITLE — APPEARING AS WITNESS FOR PARTY. A vendor in a conditional sales contract who testifies on behalf of the vendee in an action to recover for injuries to the property, waives his right to recover for the damages, if any he had. *Stotts v. Puget Sound Traction, Light & Power Co*..... 339
2. ESTOPPEL—LACHES. The owner of property who suffers another to take title and accepts a deed from him subject to mortgage and pays interest on the mortgage for three years, is guilty of laches precluding any defense to a suit to foreclose the mortgage. *Schweiter v. Hooker* 642

EVIDENCE:

See EMBEZZLEMENT, 2; FRAUDULENT CONVEYANCES; SPECIFIC PERFORMANCE, 2.
Incorporation in record on appeal, see APPEAL AND ERROR, 10-12.
Review on appeal, see APPEAL AND ERROR, 10, 11, 16.
Presumptions on appeal, see APPEAL AND ERROR, 21.
Harmless error in rulings on, see APPEAL AND ERROR, 30-34.
Of consideration for extending time for payment of note, see BILLS AND NOTES, 4.
Payment of note, see BILLS AND NOTES, 5.
Establishment of boundary, see BOUNDARIES.
For personal injuries to passenger, see CARRIERS, 6.
To show ownership of stock in insolvent corporation, see CORPORATIONS, 2.
Condemnation proceedings, see EMINENT DOMAIN, 1, 7.
Presentment of claim to executrix, see EXECUTORS AND ADMINISTRATORS, 2.
Of fraud, sufficiency, see FRAUD, 5.
In prosecution for gambling, see GAMING, 2, 3.
For personal injuries to traveler on county road, see HIGHWAYS.
In prosecution for murder, see HOMICIDE, 2.

EVIDENCE—CONTINUED.

Separate character of property, see HUSBAND AND WIFE, 1.
As to customary amount of overhead expense in business, see JOINT ADVENTURES, 3.
Of balance due under profit-sharing contract, see JOINT ADVENTURES, 4.
Conclusiveness of recitals in judgment, see JUDGMENT, 2.
Implied agreement to pay rent, see LANDLORD AND TENANT, 6.
To sustain conviction of larceny in receiving stolen goods, see LARCENY.
For injuries to servant in general, see MASTER AND SERVANT, 11, 12.
To show benefits to property from public improvement, see MUNICIPAL CORPORATIONS, 7.
Excessiveness of assessment for public improvement, see MUNICIPAL CORPORATIONS, 8.
Notice of defect in city street, see MUNICIPAL CORPORATIONS, 18.
For personal injuries to person in city street, see MUNICIPAL CORPORATIONS, 18, 19.
Conflicting evidence as ground for new trial, see NEW TRIAL, 1.
Disclosure of privileged communications, see PHYSICIANS AND SURGEONS.
Admissibility of evidence under pleading, see PLEADING, 6, 7.
Agency, see PRINCIPAL AND AGENT, 1.
Negligence in killing stock on track, see RAILROADS, 9, 10.
In civil action for rape, see RAPE, 1, 3-7.
Proof of foreign laws, see STATUTES, 5.
Negligence of driver of taxicab struck by street car, see STREET RAILROADS, 2.
Testimony of witnesses, see WITNESSES.

1. EVIDENCE—JUDICIAL NOTICE. The courts will take judicial notice that "wood alcohol" is a poison. *State v. Takano*..... 119

2. EVIDENCE—ADMISSION—OFFER TO COMPROMISE. In a civil action for rape, evidence is admissible that, when plaintiff charged the defendant with the paternity of her child and demanded a settlement, he did not deny it, and is not subject to the objection that it touches an offer to compromise, when the defendant did not offer to settle. *Eckhart v. Peterson*..... 379

3. EVIDENCE—ADMISSIONS — CONSIDERATION FOR RELEASE. In an action for personal injuries, upon a plea of satisfaction and accord, a release which was without consideration would not be admissible because it contained a statement that the accident was purely an accident for which the defendant was in no way responsible. *Shilliam v. Newman* 637

4. EVIDENCE—PAROL EVIDENCE TO VARY WRITING—INDEFINITENESS. A mortgage for $3,500 upon nine acres of land, requiring a house on the premises of the value of $2,500 to be insured for the benefit of

EVIDENCE—CONTINUED.

the mortgagee, and providing that, on the payment of $600, any acre of land should be released, is sufficiently indefinite to admit of parol evidence that the release clause was not intended to apply to the acre upon which the house was situated. *Holland-North America Mortgage Co. v. Masters*..... 542

5. EVIDENCE—EXPERTS—ATTORNEYS—QUALIFICATION—DISCRETION. An attorney testifying as to the laws of Alaska, as shown by a code, sufficiently qualifies as an expert where he testified that he had practiced law in that territory for three years and was so practicing when the code took effect; the qualification of an expert being largely within the discretion of the trial court. *Lipsett v. Dettering*.... 629

EXAMINATION:

Of witnesses in general, see WITNESSES.

EXCESSIVE ASSESSMENT:

For public improvement, see MUNICIPAL CORPORATIONS, 8.

EXCESSIVE DAMAGES:

See RAPE, 10.

EXCHANGE OF PROPERTY:

Enforcement of contract for, see SPECIFIC PERFORMANCE, 1.

EXCUSE:

For failure to discharge mortgage after satisfaction, see MORTGAGES, 3.

EXECUTION:

Exemptions, see HOMESTEADS, 3, 4.
Of mortgage by wife, see HUSBAND AND WIFE, 2, 4.

EXECUTORS AND ADMINISTRATORS:

Testimony as to transactions with decedents, see WITNESSES, 2, 3.

1. EXECUTORS AND ADMINISTRATORS—LIENS FOR ADVANCES. Where an administrator brought an action to subject equitable interests in certain lands to the claims of creditors of the estate, he is not entitled to have a lien declared for the sums he intends to advance to pay the purchase price of the lands, but is properly relegated to the probate proceedings where the court can make an appropriate order with all the heirs before the court. *Plath v. Mullins*..... 154

2. EXECUTORS AND ADMINISTRATORS — CLAIMS — PRESENTATION — EVIDENCE—SUFFICIENCY. The evidence sustains a finding that a claim was duly presented to an executrix as required by Rem. Code, § 1479, where it appears that a claim duly verified was mailed to and received by the executrix. *Gray v. Hickey*..... 370

EXECUTORS AND ADMINISTRATORS—CONTINUED.

3. EXECUTORS AND ADMINISTRATORS—ACTIONS—FORECLOSURE OF LIEN—CONDITION PRECEDENT—CLAIMS. No action can be maintained to foreclose a laborer's lien for cutting wood under a contract entered into with the deceased during his lifetime, whether the contract was performed wholly or in part after his death, where the claim was not presented to his executor or administrator for allowance or rejection. *Gray v. Hickey* 370

4. EXECUTORS AND ADMINISTRATORS—ACTIONS—CONDITIONS PRECEDENT—CLAIMS—PARTIES INTERESTED—FORECLOSURE OF LIEN FOR BENEFIT OF LABORERS. Where a contractor for cutting wood filed a claim against the executrix of the owner's estate for the whole sum due under the contract, including unpaid sums due to his laborers, and prosecuted an action assuming the attitude that the laborers were entitled to participate in the benefits thereof, his claim against the estate, although not sufficient to support independent actions by the laborers to foreclose their individual liens, is sufficient to support a personal judgment in favor of the contractor, in which the laborers may be allowed to participate by including the amount due them for their work, without costs of suit in their favor. *Gray v. Hickey*..... 370

EXEMPTIONS:

See HOMESTEAD, 3, 4.
From automobile license law, see LICENSES, 3-5.

EXHIBITS:

In civil action for rape, see RAPE, 7.

EXPENSE:

Apportionment of between railroads desiring to cross at grade, see RAILROADS, 1-4.

EXPERT TESTIMONY:

In civil actions, see EVIDENCE, 5.

EXTENSION:

Of time for payment of note, consideration, see BILLS AND NOTES, 4.
Of time for payment of note as releasing surety, see PRINCIPAL AND SURETY, 4.

EXTRADITION:

1. EXTRADITION — INTERSTATE — RIGHTS OF ACCUSED — TRIAL — SAME CHARGE. It must be assumed that accused was tried on the charge on which he was extradited, where he was extradited on a charge of grand larceny pending before a committing magistrate, and waived examination and was bound over and later charged in a new information with grand larceny jointly with another, and separately tried and convicted, it not being shown that the conviction was based upon other facts than those originally charged. *State v. Knowles* 351

FEDERAL COURTS:

When decisions controlling in state courts, see COURTS.

FEES:

For inspection of oils coming from other state, see CUSTOMS DUTIES.

FILING:

Contractor's bond on railroad work, see RAILROADS, 7, 8.

FINDINGS:

Review on appeal, see APPEAL AND ERROR, 25, 26.

On appeal from assessment for benefits from local improvement, see MUNICIPAL CORPORATIONS, 11.

FINES:

1. FINES—DISPOSITION—STATUTES—CONSTRUCTION. The act of 1909, Rem. Code, § 4606, providing that "except as otherwise provided by law," all fines imposed for breaches of the penal statutes shall be credited to the current state school fund, supersedes all prior statutes covering the same subject-matter; since otherwise there would be nothing left upon which the section could operate. *Slayden v. Carr* 412

FIXTURES:

Subject to mechanics' liens, see MECHANICS' LIENS, 3.

FORECLOSURE:

Of laborer's lien, under contract entered into with deceased, see EXECUTORS AND ADMINISTRATORS, 3, 4.

Of lien, see MECHANICS' LIENS.

Of mortgage, see MORTGAGES, 6.

FOREIGN LAWS:

Proof of, see STATUTES, 5.

FORMER ADJUDICATION:

See JUDGMENT, 3.

FORMER JEOPARDY:

Bar to prosecution, see CRIMINAL LAW, 3.

FRAUD:

See FRAUDULENT CONVEYANCES.

As defense to enforcement of contract, see SPECIFIC PERFORMANCE, 3.

1. FRAUD—SELLER'S PRAISE—INSTRUCTIONS. In an action for fraud in the sale of an automobile which was at hand and examined by

FRAUD—CONTINUED.

the purchaser, it is proper to instruct that the seller has a right to exalt the value of his property to the highest point the purchaser's credulity will bear, and boastful assertions and exaggerated description do not amount to fraud. *Biel v. Tolsma*..... 104

2. SAME. In such an action, it is a proper test of actionable fraud that the representations complained of must be calculated to deceive a person acting with reasonable and ordinary prudence. *Biel v. Tolsma* 104

3. SAME—STATEMENTS AS TO VALUE—INSTRUCTIONS. In such an action, it is proper to instruct that a person may not rely upon mere opinions as to the value of the property, and must use that degree of caution and diligence in ascertaining the conditions of the property which an ordinarily prudent man would exercise under like circumstances. *Biel v. Tolsma*..... 104

4. FRAUD—MISREPRESENTATIONS—LIABILITY. The evidence is insufficient to support a finding of fraud in inducing plaintiff to come to the state of Washington to solicit insurance as state agent of the Masonic Protective Association, which was contrary to the laws of the order, where there were no false statements of fact; since the plaintiff being a Mason, was presumed to know the rules of the order, and the representation that he could make big money by coming to the state was clearly an expression of opinion. *Davis v. Masonic Protective Association* 406

5. FRAUD—EVIDENCE—SUFFICIENCY. A charge of fraud in a real estate transaction in representing that defendant would dedicate a street, without any intention of doing so, is not sustained by the necessary clear and convincing evidence, where one witness merely testified that he tried to buy the parcel and the defendant refused to sell it, and another witness testified that the defendant stated three or four months previously that he did not then intend to dedicate. *Crary v. Hopkins*..... 424

FRAUDS, STATUTE OF:

1. FRAUDS, STATUTE OF—INTEREST IN LAND—OPTION—ORAL RESCISSION—PART PERFORMANCE. An option for the sale of real estate, required by the statute of frauds to be in writing, cannot be abrogated by a subsequent oral contract, unless accompanied by acts of part performance; hence an executory oral agreement to rescind the option and refund the option money if the property should be sold is unenforceable. *Woolen v. Sloan*..... 551

2. SAME. It is not a sufficient part performance of such a contract to take it out of the operation of the statute of frauds that the holder made efforts to sell the property, where the option was not exercised within the time limited, the efforts to sell were unsuccessful, a note given for the option money was paid up after the lapse

FRAUDS, STATUTE OF—CONTINUED.

of the option, and the situation of the parties was not changed to the advantage or disadvantage of either. *Woolen v. Sloan*..... 551

3. FRAUDS, STATUTE OF—SALES—WRITING—PAROL WAIVER OF STIPULATION. A stipulation as to the quality of poles sold by written contract may be waived by an oral agreement to accept poles corresponding with a sample furnished, without bringing the sale within the statute of frauds. *Schulze v. Buckeye Lumber Co*..... 520

FRAUDULENT CONVEYANCES:

See BANKRUPTCY, 3.

1. FRAUDULENT CONVEYANCES—EVIDENCE—BURDEN OF PROOF. Upon an issue as to whether property belonging to a judgment debtor had been put into the name of a corporation to defraud creditors, the burden of proof is upon the plaintiff to establish the fraud and overcome the presumption of good faith in favor of ordinary business transactions by clear and satisfactory evidence. *Scouse v. Alaska & Yakima Investment Co*..... 250

FREEDOM OF SPEECH:

See CONSTITUTIONAL LAW, 2, 3.

FUNDS:

Appropriation by legislature, form of, see STATES.

GAMING:

See CRIMINAL LAW, 8, 9.

1. GAMING — INFORMATION — NAME OF OFFENSE. An information charging the acts constituting gambling as defined in Rem. Code, § 2469, is not defective in that it erroneously designates the offense as "conducting gambling." *State v. Moser*..... 465

2. GAMING—EVIDENCE—ADMISSIBILITY. In a prosecution for gambling, it is inadmissible to show that like games were conducted in the community and not generally considered to be gambling games. *State v. Moser*..... 465

3. GAMING—EVIDENCE—SUFFICIENCY. A conviction of conducting a gambling game as owner is sustained by evidence that the accused furnished a room and the necessary paraphernalia for playing stud-poker, encouraged his customers to engage in it, and oversaw the game and took a percentage of the wagers on each hand. *State v. Moser* 465

GARNISHMENT:

Pendency of other action as bar, see ABATEMENT AND REVIVAL.

1. GARNISHMENT — PROPERTY SUBJECT — LIEN OF OUTSTANDING JUDGMENT—PRIORITIES. A judgment lien against the real property of the

GARNISHMENT—CONTINUED.

judgment debtors held subject to option given by them, takes precedence over subsequent writs of garnishment against the purchase price of the property, paid into court by the purchaser on exercising the option; since a garnishor can claim no greater interest in the fund than the judgment debtors had. *Searle v. Bird*..... 21

2. GARNISHMENT—OF JUDGMENT — ASSIGNMENT — PRIORITIES. Under Rem. Code, § 664, which provides that a judgment debtor of the defendant may be garnished when the judgment has not been previously assigned on the record or by writing filed in the office of the clerk, a garnishment is superior to an assignment of the judgment which was not filed until three hours after the writ was served. *Mottet v. Stafford*..... 572

3. SAME—AMENDMENT OF AFFIDAVIT—EFFECT. Rights under an original writ of garnishment not served on the wife of the judgment debtor are not lost by the filing of an amended affidavit and causing a new writ to be served on the wife, since the amendment was one contemplated by Rem. Code, § 303, as not affecting rights acquired. *Mottet v. Stafford*..... 572

GRUBSTAKE:

Agreement to drill for oil, see JOINT ADVENTURES, 1; MINES AND MINERALS, 4, 5.

GUARANTY:

See PRINCIPAL AND SURETY.

HABITUAL CRIMINALS:

See CRIMINAL LAW, 4, 5.

HARMLESS ERROR:

In civil actions, see APPEAL AND ERROR, 27-37.
In criminal prosecution, see CRIMINAL LAW, 15-17.

HEARING:

Necessity of hearing to order summary punishment for contempt, see CONTEMPT, 3.

HIGHWAYS:

Harmless error in instructions in action for injury to traveler through obstruction in county road, see APPEAL AND ERROR, 35, 36.

1. HIGHWAYS — OBSTRUCTIONS — PERSONAL INJURIES — NEGLIGENCE — EVIDENCE. Negligence in the maintenance of a county road is not shown by the fact that a log was left near the side of the road, which was in good condition and thirteen feet wide and reasonably safe for travel, and no accident would have happened except for the fact that plaintiff, carrying no lights, turned out of the roadway into the bank on a dark night. *Matson v. Pierce County*..... 38

HOMESTEAD:

1. HOMESTEAD—RESIDENCE—STATUTE—CONSTRUCTION. Where a husband and wife, for a year or more prior to the filing of a declaration of homestead, actually made their home upon the land, although the husband was absent considerable of the time on business, their homestead right was perfected, under Rem. Code, § 552, providing that the homestead must "be actually intended and used for a home for the claimants," as that has reference only to the qualifications at the time of the filing. *Byam v. Albright*..... 108

2. SAME—"ABANDONMENT"—REMOVAL FROM STATE — STATUTES — CONSTRUCTION. A homestead right, duly perfected by husband and wife residing on the land, is not abandoned by the subsequent removal of the claimants from the state, in view of Rem. Code, § 535, providing that a homestead can be abandoned only by a declaration of abandonment, or a grant thereof, executed and acknowledged by the husband and wife, and Id., § 536, providing that a declaration of abandonment shall be effectual only from the time it is filed, and Id., § 561, providing that the homestead shall descend to heirs or devisees and shall in no case be liable for the debts of the owner except as provided in the act. *Byam v. Albright*..... 108

3. SAME. Rem. Code, § 571, providing that nothing in this *chapter* shall be construed to exempt from attachment or execution the property of nonresidents, applies only to the Code of 1881, and not to the subsequent act of 1895; and hence does not prevent persons removing from the state from claiming homestead rights in lands acquired under the act of 1895. *Byam v. Albright*..... 108

4. SAME — SALE UNDER EXECUTION — "NECESSARIES." Under Rem. Code, § 564, providing that no property shall be exempt from execution for actual necessities, not exceeding $50 in value furnished within sixty days, an execution sale of a homestead upon a judgment for $645 is not validated by the fact that $32.79 of the sum received was for necessities furnished within the time limited, there being no allegation in the complaint that part was for necessities. *Byam v. Albright*..... 108

HOMICIDE:

1. HOMICIDE—MANSLAUGHTER—INTENT. The act of selling unbranded poison, from which death results is manslaughter, although without intent to take human life, under Rem. Code, §§ 2392 to 2394. *State v. Takano* 119

2. HOMICIDE—SELF-DEFENSE—EVIDENCE—QUESTION FOR JURY. Upon a plea of self-defense, in a prosecution for homicide in which there was evidence tending to show that the accused intended to take a child from the custody of another, at any hazard, armed himself with a revolver, entered the house without warning, and the killing thereafter ensued, it was proper to leave to the jury the question

HOMICIDE—CONTINUED.

whether the accused was unlawfully in the house where the affray occurred or whether his going there was lawful. *State v. Lance*. 484

3. HOMICIDE—SELLING POISON WITHOUT LABEL—INFORMATION. An information charging the accused with producing death through the sale of "wood alcohol" to be used as a beverage is sufficient without charging that it is a poison or that the accused knew it would produce death if drunk; especially in view of Rem. Code, § 2508, prohibiting the sale of any "preparation which according to standard works on medicine or *materia medica* is liable to be destructive to adult human life" unless it is labeled as a poison. *State v. Takano* 119

4. HOMICIDE — SELLING POISONS — "WOOD ALCOHOL." Wood alcohol cannot be said to be not intoxicating, where it appears that the preliminary symptoms resemble those observed after an excessive dose of alcohol, although more marked. *State v. Takano*..... 119

HUSBAND AND WIFE:

Property of as assets in bankruptcy, see BANKRUPTCY, 1.

1. HUSBAND AND WIFE — SEPARATE PROPERTY OF WIFE — EVIDENCE — SUFFICIENCY. Property acquired by a wife during coverture, purchased by her with her separate funds without any contribution thereto by her husband, is her separate property; and her testimony to that effect is sufficient to overcome the presumption that it was community property. *Carlson v. Rea*..... 218

2. HUSBAND AND WIFE — SEPARATE PROPERTY—MORTGAGE — SIGNATURE OF WIFE. Where a man obtained record title to land by fraud, his wife has no community interest in the property; hence a mortgage thereon is not invalid because not signed by the wife, as against an innocent mortgagee. *Schweiter v. Hooker*..... 642

3. SAME—MORTGAGES—RATIFICATION BY WIFE. A wife signing a conveyance of land subject to a mortgage purporting to be signed by her, ratifies the mortgage. *Schweiter v. Hooker*..... 642

4. SAME—FORECLOSURE—DEFENSES—RATIFICATION. One who accepts a deed subject to a mortgage cannot, as against an innocent mortgagee, defend a suit to foreclose the mortgage on the ground that the mortgage was not signed by the wife of the mortgagor. *Schweiter v. Hooker* 642

5. HUSBAND AND WIFE—JUDGMENT AGAINST HUSBAND—SEPARATE DEBT —FORM—LIABILITY OF COMMUNITY. A provision in a judgment authorizing execution against "any property" of the defendant, personally and as administrator of the estate of a joint obligor, is not erroneous in that it authorizes execution against the community property of defendant and wife; as the provision in question adds nothing to the effect of the judgment, which can only be satisfied

HUSBAND AND WIFE—CONTINUED.

from the separate property of the defendant if it is based on a separate debt. *Bingham v. Domer*..... 255

6. HUSBAND AND WIFE—COMMUNITY DEBT. In an action against husband and wife for the negligence of the husband in driving an automobile for hire for the benefit of the community, a judgment against husband and wife "and each of them" is erroneous as being against her separate estate and should be confined to her community interest. *Mogelberg v. Calhoun*..... 662

IMPEACHMENT:

Of witness, see WITNESSES, 6.

IMPLIED CONTRACTS:

See ACCOUNT STATED.

To pay rent, see LANDLORD AND TENANT, 6.

IMPROVEMENTS:

Public improvements, see MUNICIPAL CORPORATIONS, 1-8, 11-13.

INCONTINENCE:

Evidence of in action for rape, see RAPE, 3.

INCRIMINATION:

Of witness, see WITNESSES, 5.

INDEMNITY:

See PRINCIPAL AND SURETY.

INDICTMENT AND INFORMATION:

See GAMING; HOMICIDE, 3; RECEIVING STOLEN GOODS.

Setting aside information as bar to prosecution, see CRIMINAL LAW, 3.

Charging accused with being an habitual criminal, see CRIMINAL LAW, 4, 5.

Criminal complaint for libel, see LIBEL AND SLANDER, 1.

1. INDICTMENT AND INFORMATION—JOINDER OF OFFENSES—ELECTION—STATUTES. Under Rem. Code, § 2601, defining the crime of larceny as capable of being committed in one of the several ways stated disjunctively in the 5th subdivision of the section, and § 2260, abrogating the common law distinction between principals and accessories before the fact, an information charging larceny by hiring two men to commit the theft of two steers, and that the men actually committed it, and that defendant purchased and received the steers from them, is not duplicitous in charging inconsistent offenses, and it is not error to refuse to require an election. *State v. Klein*..... 212

INDORSEMENT:

Of bill of exchange or promissory note, see BILLS AND NOTES, 3.

INDUSTRIAL INSURANCE:

Application and scope of act, see MASTER AND SERVANT, 1-9.

INFORMATION:

Criminal accusation, see INDICTMENT AND INFORMATION.

INFRINGEMENT:

Of trade-mark, see TRADE-MARKS AND TRADE-NAMES.

INJUNCTION:

Enjoining use of trade-mark, see TRADE-MARKS AND TRADE-NAMES, 4.

INSOLVENCY:

See BANKRUPTCY.
Of corporation, see CORPORATIONS.

INSPECTION:

Oil inspection law as regulation of interstate commerce, see COMMERCE.

INSTRUCTIONS:

Exceptions or objections for purpose of review, see APPEAL AND ERROR, 4.
Harmless error in giving or refusing, see APPEAL AND ERROR, 35-37.
In criminal prosecutions, see CRIMINAL LAW, 2, 6, 7, 13, 14, 17.
In civil actions, see TRIAL, 7.

INSURANCE:

Industrial insurance act, scope of, see MASTER AND SERVANT, 1-9.
Right of party insured against loss to maintain action as real party in interest, see PARTIES.

INTENT:

As element of crime, see HOMICIDE, 1.
Malicious intent in defamation of deceased person, see LIBEL AND SLANDER, 1.

INTEREST:

On unliquidated claim for lien against vessel for cartage of materials, see MECHANICS' LIENS, 14.
On legacies, see WILLS, 4.

INTERSTATE COMMERCE:

Laws providing penalty for delay in furnishing cars to shippers as regulation of interstate commerce, see CARRIERS, 4, 5.
Oil inspection law as regulation of, see COMMERCE.
Decision of Federal court relating to, conclusiveness, see COURTS, 1.
Exacting inspection fee on oils coming from other state as interference with, see CUSTOMS DUTIES.

INTERSTATE EXTRADITION:

See EXTRADITION.

INTOXICATING LIQUORS:

Wood alcohol as intoxicating liquor, see HOMICIDE, 4.
Lease of premises for saloon purposes, see LANDLORD AND TENANT, 1-5.

1. INTOXICATING LIQUORS — REGULATION— MANUFACTURES —"INTEREST IN RETAIL BUSINESS"—STATUTES. Rem. Code, § 6282, making it unlawful for any manufacturer or wholesale dealer in intoxicating liquors to own or have any interest in the "liquor stock, fixtures or equipment" of any retail liquor store, does not apply to the premises on which the liquor business is conducted or invalidate a real estate mortgage thereon given by the dealer to a brewer. *Rashford v. Ridgefield State Bank*..... 207

ISSUES:

In civil actions, see PLEADING, 7.

JEOPARDY:

Former jeopardy, see CRIMINAL LAW, 3.

JOINDER:

Of causes of action, see ACTION.
Of offenses in information, see INDICTMENT AND INFORMATION.

JOINT ADVENTURES:

1. JOINT ADVENTURES—CONTRACT. An arrangement in the nature of a grubstake whereby one party was to furnish drilling machinery and advances in consideration of a half interest in oil leases upon discovery of oil, is not a joint enterprise or undertaking to operate or develop joint property and divide proceeds, thereby creating a partnership; since there was no joint ownership of property. *Mattocks v. Great Northern R. Co*..... 44

2. JOINT ADVENTURES—NATURE—"NET PROFITS"—UNEQUAL CONTRIBUTION. An agreement to share equally the "net profits" on a contract for finishing, painting, and decorating a building, constitutes a joint adventure and not a partnership, requiring an equal division of property without regard to any inequality in contribution or interest on money advanced. *Zech v. Bell*..... 344

3. SAME—"NET PROFITS"—OVERHEAD EXPENSE — CUSTOM — EVIDENCE. Under an agreement to share the "net profits" of a contract for finishing, painting, and decorating a building, "overhead" expense cannot be allowed on the testimony by one party that it "customarily" amounted to eighteen per cent in his business, in the absence of evidence that there was a general or trade custom to that effect, or that the other party was informed of such overhead expense at the time of making the contract of joint adventure. *Zech v. Bell*.... 344

JOINT ADVENTURES—CONTINUED.

4. SAME — CONTRACT — BALANCE — EVIDENCE — SUFFICIENCY. That a profit-sharing contract was made and a balance due to plaintiff appears from admissions of the defendant in a letter referring to the probable net profits, stating the sum plaintiff had had in salary and profits, and to the effect that defendant would soon compute and pay the balance due him. *Zech v. Bell*..... 344

JUDGES:

Comments by as harmless error, see APPEAL AND ERROR, 28.
Comments by as denial of fair trial, see TRIAL, 1.

JUDGMENT:

Review, see APPEAL AND ERROR.
Remand for entry of upon reversal on appeal, see APPEAL AND ERROR, 39.
In attachment, preservation of lien, see ATTACHMENT, 2.
In action by purchaser from trustee to quiet title, see BANKRUPTCY, 4.
In contempt proceedings, see CONTEMPT, 2, 3.
Date of as time for taxation of costs, see COSTS, 2.
Decisions of courts in general, see COURTS.
Designation of offense, see CRIMINAL LAW, 9.
Arrest of judgment, appeal by state from order, see CRIMINAL LAW, 11.
As bar to proceeding for supplemental assessment, see DRAINS, 1.
Garnishment of, see GARNISHMENT, 2.
As separate or community debt, see HUSBAND AND WIFE, 5, 6.
For enforcement of mechanics' lien, see MECHANICS' LIENS, 12, 13.
Conclusiveness of award and judgment in condemnation proceedings, see MUNICIPAL CORPORATIONS, 9, 10.

1. JUDGMENT—ENTRY—POWER TO CORRECT. A clerk's minute entry of a judgment of dismissal is properly set aside and expunged as inadvertent where it was entered without the knowledge of court or counsel, upon the court's oral announcement of an intent to order a dismissal notwithstanding the verdict, upon which the matter was postponed until counsel could prepare a formal judgment to be presented to the court; and hence does not prevent the court from entering a different judgment when the matter was presented to him with counsel for both parties before the court pursuant to the previous understanding. *Shaughnessy v. Northland Steamship Co.* 325

2. JUDGMENT— RECITALS — PERSONS CONCLUDED — EVIDENCE —BURDEN OF PROOF. Where, after judgment against a trust company holding the record title to lands, plaintiff obtained judgment against the trust company by confession declaring that it held the legal title as trustee for the plaintiff, the judgment, though not binding on the judgment creditors, is *prima facie* evidence of the fact of trustee-

JUDGMENT—CONTINUED.

ship, in an action brought by plaintiff against the judgment creditors to quiet his title, and it devolves upon the judgment creditors to show that the judgment was fraudulent as to them. *Sullivan v. Porter* 187

3. JUDGMENT — RES ADJUDICATA — EJECTMENT — MATTERS CONCLUDED. In an action of ejectment between adjoining landowners, judgment upon a defective verdict merely finding for the plaintiff, is not *res adjudicata* or a bar to to a second action to establish the lost boundary line upon the ground, under Rem. Code, § 795, where the former judgment was merely to the effect that the plaintiff recover possession of the premises, which were not described with sufficient accuracy to enable possession to be delivered without reference to matter outside the judgment. *Weidlich v. Independent Asphalt Paving Co.* 395

4. JUDGMENT—LIEN—PROPERTY AFFECTED — OPTIONS — TITLE. Where an absolute deed was made under an option agreement providing that the deed should be considered a mortgage for the purpose of securing a loan of $2,000, and giving the grantee the option to purchase, the title to the property remained in the grantors, and is subject to the lien of judgments recovered against them, in the order of their priority. *Searle v. Bird* 21

JUDICIAL NOTICE:

See EVIDENCE, 1.

JUDICIAL POWER:

Adoption of rules governing reciprocal demurrage charges for failure to furnish cars to shippers as assuming judicial powers by public service commission, see CARRIERS, 2.

JURISDICTION:

See MANDAMUS.

Appellate jurisdiction, see APPEAL AND ERROR, 1-5.

To punish for contempt committed in the view and presence of the court, see CONTEMPT, 2.

Particular courts, see COURTS.

Of action to foreclose lien for construction of vessel, see MECHANICS' LIENS, 1, 2.

JURY:

Instructions in criminal prosecutions, see CRIMINAL LAW, 2, 6, 7, 13, 14, 17.

Verdict in criminal prosecutions, see CRIMINAL LAW, 8.

Verdict in action of ejectment between adjoining landowners, see EJECTMENT.

Verdict in civil action, see RAPE, 10.

JURY—CONTINUED.

Waiver of jury trial, see TRIAL, 6.
Instructions in civil actions, see TRIAL, 7.
Trial of equitable action, see TRIAL, 8.

JUSTICES OF THE PEACE:

Appeals from conviction in justice court, see CRIMINAL LAW, 10.

LABOR LIENS:

See MECHANICS' LIENS, 3, 4.
Foreclosure of, condition precedent, see EXECUTORS AND ADMINISTRATORS, 3, 4.

LACHES:

As working estoppel, see ESTOPPEL, 2.

LANDLORD AND TENANT:

Laborer's lien against landlord, see MECHANICS' LIENS, 3.

1. LANDLORD AND TENANT—LEASE—COVENANTS—CONDITIONS. A covenant granting leased premises for the specific use of a saloon business is not a condition subsequent for the benefit of the lessor which could be waived at his option, and therefore not affected by a subsequent act of the legislature making such lease unlawful; but is a conveyance of a limited estate for a limited term which is terminated by the prohibition act. *Shepard v. Sullivan*..... 134

2. LANDLORD AND TENANT — LEASE — MODIFICATION. Where a lease stipulated that the premises were not to be used for any other purposes than that of a saloon, a subsequent modification permitting a sublease of a portion of the premises for a restaurant, cigar and bootblack business, does not change the principal purpose of the lease. *The Stratford v. Seattle Brewing & Malting Co*..... 125

3. SAME—LEASE—"SALOON." A lease of premises for a "saloon business" necessarily contemplates the business of selling intoxicating liquors. *The Stratford v. Seattle Brewing & Malting Co*..... 125

4. SAME—LEASE—TERMINATION—EFFECT OF PROHIBITION LAW ON "SALOON" LEASE. The prohibition law, Rem. Code, § 6262-5, making it illegal after January 1, 1916, to lease or permit the use of premises for the purpose of selling intoxicating liquors, annuls the unexpired term of a lease of premises for a saloon. *The Stratford v. Seattle Brewing & Malting Co*..... 125

5. SAME. It is immaterial that permission had been granted to use portions of the premises for other purposes, where the lessee had agreed to rent the premises and use them for a saloon. *The Stratford v. Seattle Brewing & Malting Co*..... 125

6. LANDLORD AND TENANT — RENT — IMPLIED AGREEMENT — EVIDENCE. There is no implied agreement to pay rent for a dwelling occupied

LANDLORD AND TENANT—CONTINUED.

by an elderly couple for a period of seven years, where it appears that $1,100 of their money was invested therein, that it was purchased for a home for them as long as they lived together, without any intention of charging them rent at the time they moved in or during the time they occupied it provided they continued to live there. *Woolen v. Sloan*..... 551

LARCENY:

See EMBEZZLEMENT; RECEIVING STOLEN GOODS.
Accessory to crime, see CRIMINAL LAW, 2.
Joinder of offenses, see INDICTMENT AND INFORMATION.

1. LARCENY—DRIVING AWAY CATTLE—RECEIVING STOLEN GOODS—EVIDENCE—SUFFICIENCY. A conviction of larceny as accessory before the fact, and of buying and selling stolen property with knowledge of the theft, under Rem. Code, § 2601, subds. 1 and 5, is sustained, where there was evidence to the effect that the accused hired two men to take two steers from the pasture of the prosecuting witness and drive them to the accused's slaughter house where he butchered them, and that part of the carcasses, which were unusually large, were traced to the possession of the accused. *State v. Klein*..... 212

LAW OF THE CASE:

See APPEAL AND ERROR, 38.

LEASES:

See LANDLORD AND TENANT.

LEGACY:

See WILLS.

LEGISLATIVE POWER:

Laws conferring legislative powers on public service commission, see CARRIERS, 1.
Legislative determination by industrial insurance commission as to extra-hazardous nature of employment, see MASTER AND SERVANT, 6.

LEGISLATURE:

Appropriation of state funds, form of, see STATES.

LIBEL AND SLANDER:

Defaming memory of deceased person as exercise of guaranty of freedom of speech, see CONSTITUTIONAL LAW, 3.

1. LIBEL AND SLANDER—CRIMINAL PROSECUTION—DEFAMATION OF DECEASED PERSON—MALICIOUS INTENT. To constitute common law libel by publishing defamatory matter of any person deceased, malicious

[illegible]

[illegible] of the defendant to secure the family and property of the deceased [illegible] and proved. *State v. Eaton* [illegible]

2. [illegible]—[illegible]—[illegible]—[illegible]—[illegible] Rem. & Bal. Code, § [illegible], which defines criminal libel as defamation of a person deceased [illegible] as to surviving relatives or friends having been superseded by Rem. Code, § [illegible], making it libel "to expose the memory of any deceased to hatred, contempt, ridicule or obloquy," a libel against whom is maintained to eliminate the prior limitations as to liability to the deceased's relatives and friends [illegible] defamation of the memory of George Washington is libel under the latter section. *State v. Eaton* [illegible]

2. Same. Rem. Code, § [illegible], making it libel to expose the "memory of the deceased" to hatred, contempt or ridicule, is not restricted to the memory of a deceased existing in the minds of living persons, but applies as well to memory resting in tradition and history. *State v. Eaton* [illegible]

LICENSES:

For operation of motor vehicles for hire in cities of first class, see Municipal Corporations, 14, 15

1. Licenses—Petroleum Tax—Uniformity—Taxation. Rem. Code, § [illegible] *et seq.*, levying a remunerative inspection tax on all oils and gasoline "before being sold or offered for sale" does not conflict with Const., art. 7, § 2, providing for uniformity and equality of taxation, and § 5 relating to the method of levying taxes; since these provisions refer to taxes upon property and not to taxes upon trades or to privilege or excise taxes. *Standard Oil Co. v. Graves*..... 291

2. Same. The exaction of a remunerative inspection fee for the inspection of all oils and gasoline "before being sold or offered for sale" is not a tax on property, since it is to be paid only upon the contingency that the oil is sold or offered for sale. *Standard Oil Co. v. Graves*..... 291

3. Licenses — Automobiles — Fees — Liability of City — Statutes. An automobile owned by a city and operated by an employee in the light and power department is not exempted from the operation of the state license law, Rem. Code, §§ 5562-1 and 5562-4, prohibiting the operation without a license of all automobiles except those owned by a city and used "exclusively" for the police or fire departments. *State v. Collins*..... 310

4. Same — Uniformity — Taxation. Rem. Code, § 5562-4, providing a license tax on all automobiles, is not a tax on property but is enforcible as a license or occupation tax, and hence does not violate

LICENSES—CONTINUED.

Const., art. 7, § 2, relating to uniformity and equality in taxation, which does not apply to privilege or excise taxes. *State v. Collins* 310

5. LICENSES—LIABILITY OF CITY—TAXATION. The proviso to Const., art. 7, § 2, exempting the property of municipal corporations from taxation cannot be segregated from the provisions of the body of the section, and hence applies only to taxes on property and not to occupation taxes. *State v. Collins*..... 310

LIENS:

See ATTACHMENT; MECHANICS' LIENS..

Of attorney, see ATTORNEY AND CLIENT.

For advances by administrator, see EXECUTORS AND ADMINISTRATORS, 1.

Foreclosure of labor liens, condition precedent, see EXECUTORS AND ADMINISTRATORS, 3, 4.

Priority of judgment lien over writ of garnishment, see GARNISHMENT, 1.

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LIMITATION OF ACTIONS:

By trustee to recover assets of insolvent corporation, see CORPORATIONS, 3.

1. LIMITATION OF ACTIONS—RUNNING ACCOUNT—ACCRUAL OF ACTION. Where goods were furnished to a city at irregular intervals during a term of years upon separate orders, and no demand made or moneys paid until after furnishing of the last item, there were no mutual demands and no mutual account that would prevent the running of the statute of limitations as to the earlier items, and the cause is barred as to all goods not furnished within three years prior to the commencement of the action under Rem. Code, § 159. *Hills v. Hoquiam*..... 63

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Pendency of other action ground for abatement, see ABATEMENT AND REVIVAL.

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Injuries from operation of railroads, see RAILROADS, 9-10.

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To contractor on public work, liability of surety, see MUNICIPAL CORPORATIONS, 1, 2.

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Of mining claim, see MINES AND MINERALS, 1-3.

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Liability of employer for defects or failure to guard, see MASTER AND SERVANT, 10-12.

MANDAMUS:

1. MANDAMUS—WHEN LIES. Mandamus lies only to compel the performance of clear duties that already exist, and to serve some useful purpose. *Edes v. Haley*..... 232

MANSLAUGHTER:

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MARITIME CONTRACTS:

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MARITIME SERVICE:

Application of workmen's compensation act, see MASTER AND SERVANT, 1-5.

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MASTER AND SERVANT:

Abolition of civil remedy for injuries sustained by city employee as denial of equal protection of laws, see CONSTITUTIONAL LAW, 5.

Liens for labor and materials, see MECHANICS' LIENS.

1. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT — EMPLOYMENTS COVERED—MARITIME SERVICE—ADMISSIBILITY. The workmen's compensation act compelling all employers and employees engaged in extra hazardous employments to submit to compulsory insurance in lieu of common law remedies, has no application to an employee engaged in unloading a ship lying at a dock in the navigable waters of Puget Sound; since to apply the act to relations arising from maritime service, which are under the legislative control and jurisdiction of the Federal government, would make it operate unequally as between employers or employees, and the state has no power to abolish the remedies afforded by the maritime laws of the United States. *Shaughnessy v. Northland Steamship Co*..... 325

2. SAME—WORKMEN'S COMPENSATION ACT—EMPLOYMENTS COVERED—"STEAMBOATS," ETC. Rem. Code, § 6604-2, extending the provisions of the workmen's compensation act to steamboats, tugs, and ferries," must be construed to apply only to vessels operating upon the inland navigable waters of the state over which the jurisdiction of the state courts is exclusive. *Shaughnessy v. Northland Steamship Co.* 325

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3. SAME. In such a case, it is immaterial whether the ship was engaged in intrastate or interstate commerce, so long as it was not in inland waters having no connection with the high seas. *Shaughnessy v. Northland Steamship Co*..... 325

4. SAME. It being impossible to compel the ship master to contribute to the accident fund in such a case, it could not have been the intent of the legislature to give his employees the right to compensation from the fund. *Shaughnessy v. Northland Steamship Co*. 325

5. SAME—WORKMEN'S COMPENSATION ACT—MARITIME SERVICE—RIGHT TO COMPENSATION—REMEDIES—ADMIRALTY. Under Rem. Code, § 6604-27 of the workmen's compensation act, providing that, if any employer shall be adjudicated to be outside of the lawful scope of the act, the act shall not apply to his workmen, an employee injured while engaged on a ship in maritime service is not relegated to his remedies in admiralty, by reason of § 6604-1, which abolishes all civil actions for personal injuries in extra hazardous work; since, being outside the lawful scope of the act, all his rights and remedies remain unimpaired as if the act had never become a law of the state. *Shaughnessy v. Northland Steamship Co*..... 325

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION—EXTRA HAZARDOUS EMPLOYMENTS—POWERS OF INDUSTRIAL INSURANCE COMMISSION—DELEGATION OF LEGISLATIVE POWERS—STATUTES. Under Rem. Code, § 6604-2, providing that the workmen's compensation act is intended to apply to all extra hazardous occupations and that "if there be or arise" any extra hazardous occupation or work other than those enumerated, it shall come under the act and its rate of contribution be determined by the industrial insurance commission, no power is delegated to the commission to decide as a legislative determination that an occupation other than those enumerated is extra hazardous, in the absence of any express delegation of such power. *State v. Powles & Co*..... 416

7. SAME—WORKMEN'S COMPENSATION—EXTRA HAZARDOUS EMPLOYMENTS—WHAT ARE. A mercantile company engaged in the commission business, dealing in fruits and produce, handled in boxes, crates, and sacks weighing less than 150 pounds, accessibly held in storerooms for immediate sale, and employing teamsters, receiving and shipping clerks, potato sorters and porters, is not engaged in an extra hazardous occupation, within the meaning of the workmen's compensation act, and the industrial insurance commission therefore has no power to recognize such a business as extra hazardous or order it to be brought under the terms of the statute. *State v. Powles & Co*..... 416

8. MASTER AND SERVANT—WORKMEN'S COMPENSATION—AWARD—DISCRETION—REVIEW—APPEAL—STATUTES—CONSTRUCTION. Where the in-

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dustrial insurance commission made an award of $225 for partial disability on account of an injury to an arm, the amount of an award for permanent disability by loss of an arm being limited to $1,500, an appeal seeking the maximum amount for total disability, involves only a question of the commission's discretion touching the amount of the award, under Rem. Code, § 6604-20, which provides that matters resting in the discretion of the department shall not be subject to review; notwithstanding such section further provides for an appeal, "in so far as such decision rests upon questions of fact," with the further provision that the "calling of a jury shall rest in the discretion of the court;" hence the decision will not be reviewed on appeal except for abuse of discretion. *Chalmers v. Industrial Insurance Commission*..... 490

9. MASTER AND SERVANT — WORKMEN'S COMPENSATION — MUNICIPAL EMPLOYEE—STATUTES—CONSTRUCTION. In view of the primary purpose of the workmen's compensation act to abolish all civil actions for personal injuries sustained in extra hazardous occupations and substitute therefor industrial insurance, the clause of the workmen's compensation act, Rem. Code, § 6604-17, which provides that so long as by state law, city charter, and municipal ordinances, provision is made for municipal employees engaged in the course of their employment, such employees shall not be entitled to the benefits of the workmen's compensation act, was not intended to allow such city employees to prosecute civil actions for damages, but rather to relegate them to the provisions made for them by the city, leaving in force the provisions of the act abolishing common law remedies. *State ex rel. Fletcher v. Carroll*..... 531

10. MASTER AND SERVANT — SAFE PLACE — DEFECTIVE GUARDS — NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The negligence of the master and the contributory negligence of the servant, are questions for the jury, where it appears that an employee, going to his work in the hold of a ship, fell through the hatch, when an iron stanchion at a corner of the hatch upholding a guard rope gave way when the employee, holding onto the rope, was starting in the usual way to descend the hatch ladder, it being necessary for him to take hold of either the rope or the top of the hatch coaming, and the rope and stanchion being apparently strong enough to support the weight of a man. *Shaughnessy v. Northland Steamship Co.*.. 325

11. MASTER AND SERVANT—APPLIANCES—NEGLIGENCE—NECESSITY — RES IPSA LOQUITUR—BURDEN OF PROOF. As between master and servant, proof of the breaking of the drawbar pin on a locomotive coupling without any known cause does not impute a defective condition due to the negligence of the master, upon the principle of *res ipsa loquitur*, but the burden is upon the servant to prove the master's negligence unless the circumstances were so unusual or so under the control of the company that the accident could not well have

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happened except through negligence on the part of the company. *Toler v. Northern Pac. R. Co*..... 360

12. SAME — APPLIANCES — DEFECTS — RES IPSA LOQUITUR—EVIDENCE — SUFFICIENCY. In such a case the principle of *res ipsa loquitur* does not apply, and the evidence is insufficient to sustain a recovery in favor of a fireman on a switch engine who was tripped and fell when the drawbar pin coupling the tender to the engine jumped up through the floor of the tender, where it appears that such pins must have some play and ordinarily jump up and fall back into place, that the pin in question had worked properly up to one-half hour before the accident when it had twice jumped up and had been driven back with force, indicating a defective condition in the pin or socket, that no one had had previous notice of the defect and there was no want of proper inspection; since there was no proof that the condition could have been discovered by inspection, and it may have simply jumped up at the instant of the accident in the ordinary way without any negligence attributable to the company. *Toler v. Northern Pac. R. Co*..... 360

MATERIALMEN:

Estoppel to claim lien by authorizing payment to contractor, see MECHANICS' LIENS, 5.

Notice to owner of materials furnished, see MECHANICS' LIENS, 10, 11.

MATURITY:

Of note at option of payee, see BILLS AND NOTES, 1, 2.

MEASURE OF DAMAGES:

For property taken for drainage ditch, see EMINENT DOMAIN, 6.

For breach of contract of sale, see SALES, 6.

MECHANICS' LIENS:

1. MECHANICS' LIENS—CONSTRUCTION OF VESSEL—JURISDICTION—STATE OR FEDERAL. An action to foreclose mechanics' liens for the construction of a vessel, seeking personal judgment against the contractor and a receivership, is not strictly an action *in rem* but only *quasi in rem*, and may be maintained in a state court against a foreign owner. *Siler Mill Co. v. Nelson Co*..... 477

2. SAME—MARITIME CONTRACTS. A contract to build a vessel not being a maritime contract, the foreclosure of liens therefor under Rem. Code, § 1182, is not within the jurisdiction of admiralty, and is properly brought against a foreign owner in a state court. *Siler Mill Co. v. Nelson Co*..... 477

3. MECHANICS' LIENS—LABORER'S LIENS AGAINST LANDLORD—PROPERTY COVERED—REMOVABLE FIXTURES BELONGING TO ANOTHER. A portable drilling apparatus, a boiler built on its own carriage wheels, and a

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drilling machine fitted on a wagon bed with wheels, belonging to the outfitter under a grubstake contract, and not attached to the soil, are not such fixtures as are coverable by liens of laborers against the leaseholds of the oil prospector employing the laborers, under the mechanics' lien laws; since the liens do not attach to property not belonging to the employer, although used by him in the work. *Mattocks v. Great Northern R. Co.* 44

4. MECHANICS' LIENS—RIGHT TO LIEN—CULTIVATING LAND. A claim for labor in cultivating an orchard is not lienable under the mechanics' lien law, Rem. Code, § 1131, which provides for a lien in favor of any person who, at the request of the owner, clears, grades, fills in, "or otherwise improves the same," as it is not of the same general class and so is within the rule of *ejusdem generis;* especially where the work was more or less intermittent extending over a period of two years, and the lien law requires the filing of a claim within ninety days from the cessation of the labor. *Howe v. Myers* 563

5. MECHANICS' LIENS—RIGHT OF LIEN—ESTOPPEL—AUTHORIZING PAYMENT TO CONTRACTOR. A materialman is estopped to claim a mechanics' lien for the balance due on materials furnished for the erection of a house, where, upon request, he authorized the owner to pay the contractor, which the owner did, thereby altering his position to his detriment. *Nelson & Castrup v. Culver* 548

6. SAME—AGENT OF OWNER—ACTS OF CONTRACTOR. A contractor for the construction of a house who gave a worthless check to a materialman for materials furnished, is not the agent of the owner of the premises to such an extent as to make the owner responsible for the giving of the worthless check. *Nelson & Castrup v. Culver* .. 548

7. MECHANICS' LIENS—WAIVER—CONTRACT. A provision in a contract for cutting wood that the contractor shall pay all bills for labor, etc., and prevent any liens being filed against the wood, does not waive the contractor's right to file a lien for a balance due him, but is merely an agreement to prevent liens by others. *Gray v. Hickey* 370

8. SAME—CARTAGE—WAIVER—DELIVERY. A claim by a common carrier for a lien against a vessel for the cartage of materials is not waived by delivery, as in the case of a possessory lien. *Siler Mill Co. v. Nelson Co* 477

9. SAME—CARTAGE—CLAIMS BY COMMON CARRIER. A common carrier may claim a lien for the cartage of lumber furnished for the construction of a vessel bought f. o. b. mill wharves, and hauled to the place of construction at the request of the contractor. *Siler Mill Co. v. Nelson Co* 477

10. MECHANICS' LIENS—NOTICE TO OWNER—NECESSITY. Where materials are furnished to the owner upon the order of the owner's general

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agent in full control and management of the lands, it is not necessary to give the owner the five days' written notice of the delivery of the materials provided for by Rem. Code, § 1133. *Spokane Valley Lumber and Box Co. v. Dawson* 246

11. SAME — CONSTRUCTION OF VESSEL — NOTICE TO OWNER — STATUTE — AMENDMENT. Rem. & Bal. Code, § 1133, requiring notice of the furnishing of materials for certain enumerated structures to be given to the owner, having been amended by 3 Rem. & Bal. Code, § 1133, by omitting therefrom the words "steamer, vessel, boat," it was the intention to dispense with the necessity of notice to owners of boats, and the same would therefore not come within the general terms "or any other building or any other structure," contained in the amending act. *Siler Mill Co. v. Nelson Co* 477

12. MECHANICS' LIENS—FORECLOSURE—DEFICIENCY JUDGMENT—PERSONS LIABLE. In an action to foreclose labor liens against the leaseholds of an oil prospector, for work done under a grubstake contract, the outfitter who furnished portable machinery for the use of the prospector cannot be made personally liable for either costs or attorney's fees, where it had no property to which the liens could attach and was not personally obligated to pay for the services. *Mattocks v. Great Northern R. Co* 44

13. SAME—FORECLOSURE—PERSONAL JUDGMENT. In an action to foreclose a contractor's lien for cutting wood, in which a portion of the claim is found to be lienable, the court has jurisdiction to render a personal judgment for the balance due on the contract. *Gray v. Hickey* 370

14. SAME—INTEREST. Interest is allowable upon an unliquidated claim for a lien against a vessel for the cartage of materials, from the date of filing the complaint, no lien notice being necessary. *Siler Mill Co. v. Nelson Co* 478

MINES AND MINERALS:

Grubstake agreement to drill for oil, see JOINT ADVENTURES, 1.

1. MINES AND MINERALS—LOCATIONS—NOTICE—"VACANT AND UNOCCUPIED"—STATUTES. The purpose of U. S. Rev. Stats., § 2324, and Rem. Code, § 7359, requiring mining locations to be marked upon the ground, being to give notice to prospectors, and being liberally construed in favor of locators, one who for years was familiar with the boundaries of a claim and knew that it had been worked and much money expended in annual assessments, cannot locate the same as "vacant and unoccupied" and assert insufficiency of the prior location notice. *Gold Creek Antimony Mines & Smelter Co. v. Perry* 624

2. SAME—LOCATIONS—FORFEITED GROUND—REQUISITES. One locating mining ground as "vacant and unoccupied," knowing that it was not so, is not entitled to claim as a locator of forfeited ground, with-

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Waiver of jury trial, see TRIAL, 6.
Instructions in civil actions, see TRIAL, 7.
Trial of equitable action, see TRIAL, 8.

JUSTICES OF THE PEACE:

Appeals from conviction in justice court, see CRIMINAL LAW, 10.

LABOR LIENS:

See MECHANICS' LIENS, 3, 4.
Foreclosure of, condition precedent, see EXECUTORS AND ADMINISTRATORS, 3, 4.

LACHES:

As working estoppel, see ESTOPPEL, 2.

LANDLORD AND TENANT:

Laborer's lien against landlord, see MECHANICS' LIENS, 3.

1. LANDLORD AND TENANT—LEASE—COVENANTS—CONDITIONS. A covenant granting leased premises for the specific use of a saloon business is not a condition subsequent for the benefit of the lessor which could be waived at his option, and therefore not affected by a subsequent act of the legislature making such lease unlawful; but is a conveyance of a limited estate for a limited term which is terminated by the prohibition act. *Shepard v. Sullivan*..... 134

2. LANDLORD AND TENANT — LEASE — MODIFICATION. Where a lease stipulated that the premises were not to be used for any other purposes than that of a saloon, a subsequent modification permitting a sublease of a portion of the premises for a restaurant, cigar and bootblack business, does not change the principal purpose of the lease. *The Stratford v. Seattle Brewing & Malting Co*..... 125

3. SAME—LEASE—"SALOON." A lease of premises for a "saloon business" necessarily contemplates the business of selling intoxicating liquors. *The Stratford v. Seattle Brewing & Malting Co*..... 125

4. SAME—LEASE—TERMINATION—EFFECT OF PROHIBITION LAW ON "SALOON" LEASE. The prohibition law, Rem. Code, § 6262-5, making it illegal after January 1, 1916, to lease or permit the use of premises for the purpose of selling intoxicating liquors, annuls the unexpired term of a lease of premises for a saloon. *The Stratford v. Seattle Brewing & Malting Co*..... 125

5. SAME. It is immaterial that permission had been granted to use portions of the premises for other purposes, where the lessee had agreed to rent the premises and use them for a saloon. *The Stratford v. Seattle Brewing & Malting Co*..... 125

6. LANDLORD AND TENANT — RENT — IMPLIED AGREEMENT — EVIDENCE. There is no implied agreement to pay rent for a dwelling occupied

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by an elderly couple for a period of seven years, where it appears that $1,100 of their money was invested therein, that it was purchased for a home for them as long as they lived together, without any intention of charging them rent at the time they moved in or during the time they occupied it provided they continued to live there. *Woolen v. Sloan*..... 551

LARCENY:

See EMBEZZLEMENT; RECEIVING STOLEN GOODS.
Accessory to crime, see CRIMINAL LAW, 2.
Joinder of offenses, see INDICTMENT AND INFORMATION.

1. LARCENY—DRIVING AWAY CATTLE—RECEIVING STOLEN GOODS—EVIDENCE—SUFFICIENCY. A conviction of larceny as accessory before the fact, and of buying and selling stolen property with knowledge of the theft, under Rem. Code, § 2601, subds. 1 and 5, is sustained, where there was evidence to the effect that the accused hired two men to take two steers from the pasture of the prosecuting witness and drive them to the accused's slaughter house where he butchered them, and that part of the carcasses, which were unusually large, were traced to the possession of the accused. *State v. Klein*.... 212

LAW OF THE CASE:

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LEASES:

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intention of the defendant to injure the family and posterity of the deceased must be expressly averred and proved. *State v. Haffer*. 136

2. SAME—DEFAMATION OF DECEASED PERSON — INJURY TO FAMILY — STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 2777, which defines criminal libel by defamation of a person deceased substantially as at common law, requiring that it tend to scandalize or provoke the deceased's surviving relatives or friends, having been superseded by Rem. Code, § 2424, making it libel "to expose the memory of one deceased to hatred, contempt, ridicule or obloquy," a clear legislative intent is manifested to eliminate the prior limitations as to injury to the deceased's relatives and friends; hence defamation of the memory of George Washington is libel under the latter section. *State v. Haffer*..... 136

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LICENSES:

For operation of motor vehicles for hire in cities of first class, see MUNICIPAL CORPORATIONS, 14, 15.

1. LICENSES—PRIVILEGE TAX — UNIFORMITY — TAXATION. Rem. Code, § 6051 *et seq.*, levying a remunerative inspection tax on all oils and gasoline "before being sold or offered for sale" does not conflict with Const., art. 7, § 2, providing for uniformity and equality of taxation, and § 5 relating to the method of levying taxes; since these provisions refer to taxes upon property and not to taxes upon trades or to privilege or excise taxes. *Standard Oil Co. v. Graves*..... 291

2. SAME. The exaction of a remunerative inspection fee for the inspection of all oils and gasoline "before being sold or offered for sale" is not a tax on property, since it is to be paid only upon the contingency that the oil is sold or offered for sale. *Standard Oil Co. v. Graves*..... 291

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Injuries from operation of railroads, see RAILROADS, 9-10.

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To contractor on public work, liability of surety, see MUNICIPAL CORPORATIONS, 1, 2.

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MARRIED WOMEN:

See HUSBAND AND WIFE.

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1. MASTER AND SERVANT — WORKMEN'S COMPENSATION ACT — EMPLOYMENTS COVERED—MARITIME SERVICE—ADMISSIBILITY. The workmen's compensation act compelling all employers and employees engaged in extra hazardous employments to submit to compulsory insurance in lieu of common law remedies, has no application to an employee engaged in unloading a ship lying at a dock in the navigable waters of Puget Sound; since to apply the act to relations arising from maritime service, which are under the legislative control and jurisdiction of the Federal government, would make it operate unequally as between employers or employees, and the state has no power to abolish the remedies afforded by the maritime laws of the United States. *Shaughnessy v. Northland Steamship Co*..... 325

2. SAME—WORKMEN'S COMPENSATION ACT—EMPLOYMENTS COVERED—"STEAMBOATS," ETC. Rem. Code, § 6604-2, extending the provisions of the workmen's compensation act to steamboats, tugs, and ferries," must be construed to apply only to vessels operating upon the inland navigable waters of the state over which the jurisdiction of the state courts is exclusive. *Shaughnessy v. Northland Steamship Co.*..... 325

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3. SAME. In such a case, it is immaterial whether the ship was engaged in intrastate or interstate commerce, so long as it was not in inland waters having no connection with the high seas. *Shaughnessy v. Northland Steamship Co*..... 325

4. SAME. It being impossible to compel the ship master to contribute to the accident fund in such a case, it could not have been the intent of the legislature to give his employees the right to compensation from the fund. *Shaughnessy v. Northland Steamship Co*. 325

5. SAME—WORKMEN'S COMPENSATION ACT—MARITIME SERVICE—RIGHT TO COMPENSATION—REMEDIES—ADMIRALTY. Under Rem. Code, § 6604-27 of the workmen's compensation act, providing that, if any employer shall be adjudicated to be outside of the lawful scope of the act, the act shall not apply to his workmen, an employee injured while engaged on a ship in maritime service is not relegated to his remedies in admiralty, by reason of § 6604-1, which abolishes all civil actions for personal injuries in extra hazardous work; since, being outside the lawful scope of the act, all his rights and remedies remain unimpaired as if the act had never become a law of the state. *Shaughnessy v. Northland Steamship Co*..... 325

6. MASTER AND SERVANT—WORKMEN'S COMPENSATION—EXTRA HAZARDOUS EMPLOYMENTS—POWERS OF INDUSTRIAL INSURANCE COMMISSION—DELEGATION OF LEGISLATIVE POWERS—STATUTES. Under Rem. Code, § 6604-2, providing that the workmen's compensation act is intended to apply to all extra hazardous occupations and that "if there be or arise" any extra hazardous occupation or work other than those enumerated, it shall come under the act and its rate of contribution be determined by the industrial insurance commission, no power is delegated to the commission to decide as a legislative determination that an occupation other than those enumerated is extra hazardous, in the absence of any express delegation of such power. *State v. Powles & Co*..... 416

7. SAME—WORKMEN'S COMPENSATION—EXTRA HAZARDOUS EMPLOYMENTS—WHAT ARE. A mercantile company engaged in the commission business, dealing in fruits and produce, handled in boxes, crates, and sacks weighing less than 150 pounds, accessibly held in storerooms for immediate sale, and employing teamsters, receiving and shipping clerks, potato sorters and porters, is not engaged in an extra hazardous occupation, within the meaning of the workmen's compensation act, and the industrial insurance commission therefore has no power to recognize such a business as extra hazardous or order it to be brought under the terms of the statute. *State v. Powles & Co*..... 416

8. MASTER AND SERVANT—WORKMEN'S COMPENSATION—AWARD—DISCRETION—REVIEW—APPEAL—STATUTES—CONSTRUCTION. Where the in-

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dustrial insurance commission made an award of $225 for partial disability on account of an injury to an arm, the amount of an award for permanent disability by loss of an arm being limited to $1,500, an appeal seeking the maximum amount for total disability, involves only a question of the commission's discretion touching the amount of the award, under Rem. Code, § 6604-20, which provides that matters resting in the discretion of the department shall not be subject to review; notwithstanding such section further provides for an appeal, "in so far as such decision rests upon questions of fact," with the further provision that the "calling of a jury shall rest in the discretion of the court;" hence the decision will not be reviewed on appeal except for abuse of discretion. *Chalmers v. Industrial Insurance Commission*..... 490

9. MASTER AND SERVANT — WORKMEN'S COMPENSATION — MUNICIPAL EMPLOYEE—STATUTES—CONSTRUCTION. In view of the primary purpose of the workmen's compensation act to abolish all civil actions for personal injuries sustained in extra hazardous occupations and substitute therefor industrial insurance, the clause of the workmen's compensation act, Rem. Code, § 6604-17, which provides that so long as by state law, city charter, and municipal ordinances, provision is made for municipal employees engaged in the course of their employment, such employees shall not be entitled to the benefits of the workmen's compensation act, was not intended to allow such city employees to prosecute civil actions for damages, but rather to relegate them to the provisions made for them by the city, leaving in force the provisions of the act abolishing common law remedies. *State ex rel. Fletcher v. Carroll*..... 531

10. MASTER AND SERVANT — SAFE PLACE — DEFECTIVE GUARDS — NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The negligence of the master and the contributory negligence of the servant, are questions for the jury, where it appears that an employee, going to his work in the hold of a ship, fell through the hatch, when an iron stanchion at a corner of the hatch upholding a guard rope gave way when the employee, holding onto the rope, was starting in the usual way to descend the hatch ladder, it being necessary for him to take hold of either the rope or the top of the hatch coaming, and the rope and stanchion being apparently strong enough to support the weight of a man. *Shaughnessy v. Northland Steamship Co.*. 325

11. MASTER AND SERVANT—APPLIANCES—NEGLIGENCE—NECESSITY — RES IPSA LOQUITUR—BURDEN OF PROOF. As between master and servant, proof of the breaking of the drawbar pin on a locomotive coupling without any known cause does not impute a defective condition due to the negligence of the master, upon the principle of *res ipsa loquitur*, but the burden is upon the servant to prove the master's negligence unless the circumstances were so unusual or so under the control of the company that the accident could not well have

MASTER AND SERVANT—CONTINUED.

happened except through negligence on the part of the company. *Toler v. Northern Pac. R. Co*..... 360

12. SAME — APPLIANCES — DEFECTS — RES IPSA LOQUITUR—EVIDENCE — SUFFICIENCY. In such a case the principle of *res ipsa loquitur* does not apply, and the evidence is insufficient to sustain a recovery in favor of a fireman on a switch engine who was tripped and fell when the drawbar pin coupling the tender to the engine jumped up through the floor of the tender, where it appears that such pins must have some play and ordinarily jump up and fall back into place, that the pin in question had worked properly up to one-half hour before the accident when it had twice jumped up and had been driven back with force, indicating a defective condition in the pin or socket, that no one had had previous notice of the defect and there was no want of proper inspection; since there was no proof that the condition could have been discovered by inspection, and it may have simply jumped up at the instant of the accident in the ordinary way without any negligence attributable to the company. *Toler v. Northern Pac. R. Co*..... 360

MATERIALMEN:

Estoppel to claim lien by authorizing payment to contractor, see MECHANICS' LIENS, 5.

Notice to owner of materials furnished, see MECHANICS' LIENS, 10, 11.

MATURITY:

Of note at option of payee, see BILLS AND NOTES, 1, 2.

MEASURE OF DAMAGES:

For property taken for drainage ditch, see EMINENT DOMAIN, 6.

For breach of contract of sale, see SALES, 6.

MECHANICS' LIENS:

1. MECHANICS' LIENS—CONSTRUCTION OF VESSEL—JURISDICTION—STATE OR FEDERAL. An action to foreclose mechanics' liens for the construction of a vessel, seeking personal judgment against the contractor and a receivership, is not strictly an action *in rem* but only *quasi in rem*, and may be maintained in a state court against a foreign owner. *Siler Mill Co. v. Nelson Co*..... 477

2. SAME—MARITIME CONTRACTS. A contract to build a vessel not being a maritime contract, the foreclosure of liens therefor under Rem. Code, § 1182, is not within the jurisdiction of admiralty, and is properly brought against a foreign owner in a state court. *Siler Mill Co. v. Nelson Co*..... 477

3. MECHANICS' LIENS—LABORER'S LIENS AGAINST LANDLORD—PROPERTY COVERED—REMOVABLE FIXTURES BELONGING TO ANOTHER. A portable drilling apparatus, a boiler built on its own carriage wheels, and a

MECHANICS' LIENS—CONTINUED.

drilling machine fitted on a wagon bed with wheels, belonging to the outfitter under a grubstake contract, and not attached to the soil, are not such fixtures as are coverable by liens of laborers against the leaseholds of the oil prospector employing the laborers, under the mechanics' lien laws; since the liens do not attach to property not belonging to the employer, although used by him in the work. *Mattocks v. Great Northern R. Co.* 44

4. MECHANICS' LIENS—RIGHT TO LIEN—CULTIVATING LAND. A claim for labor in cultivating an orchard is not lienable under the mechanics' lien law, Rem. Code, § 1131, which provides for a lien in favor of any person who, at the request of the owner, clears, grades, fills in, "or otherwise improves the same," as it is not of the same general class and so is within the rule of *ejusdem generis;* especially where the work was more or less intermittent extending over a period of two years, and the lien law requires the filing of a claim within ninety days from the cessation of the labor. *Howe v. Myers* 563

5. MECHANICS' LIENS—RIGHT OF LIEN—ESTOPPEL—AUTHORIZING PAYMENT TO CONTRACTOR. A materialman is estopped to claim a mechanics' lien for the balance due on materials furnished for the erection of a house, where, upon request, he authorized the owner to pay the contractor, which the owner did, thereby altering his position to his detriment. *Nelson & Castrup v. Culver* 548

6. SAME—AGENT OF OWNER—ACTS OF CONTRACTOR. A contractor for the construction of a house who gave a worthless check to a materialman for materials furnished, is not the agent of the owner of the premises to such an extent as to make the owner responsible for the giving of the worthless check. *Nelson & Castrup v. Culver* .. 548

7. MECHANICS' LIENS—WAIVER—CONTRACT. A provision in a contract for cutting wood that the contractor shall pay all bills for labor, etc., and prevent any liens being filed against the wood, does not waive the contractor's right to file a lien for a balance due him, but is merely an agreement to prevent liens by others. *Gray v. Hickey* 370

8. SAME—CARTAGE—WAIVER—DELIVERY. A claim by a common carrier for a lien against a vessel for the cartage of materials is not waived by delivery, as in the case of a possessory lien. *Siler Mill Co. v. Nelson Co.* 477

9. SAME—CARTAGE—CLAIMS BY COMMON CARRIER. A common carrier may claim a lien for the cartage of lumber furnished for the construction of a vessel bought f. o. b. mill wharves, and hauled to the place of construction at the request of the contractor. *Siler Mill Co. v. Nelson Co.* 477

10. MECHANICS' LIENS—NOTICE TO OWNER—NECESSITY. Where materials are furnished to the owner upon the order of the owner's general

MECHANICS' LIENS—CONTINUED.

agent in full control and management of the lands, it is not necessary to give the owner the five days' written notice of the delivery of the materials provided for by Rem. Code, § 1133. *Spokane Valley Lumber and Box Co. v. Dawson* 246

11. SAME — CONSTRUCTION OF VESSEL — NOTICE TO OWNER — STATUTE — AMENDMENT. Rem. & Bal. Code, § 1133, requiring notice of the furnishing of materials for certain enumerated structures to be given to the owner, having been amended by 3 Rem. & Bal. Code, § 1133, by omitting therefrom the words "steamer, vessel, boat," it was the intention to dispense with the necessity of notice to owners of boats, and the same would therefore not come within the general terms "or any other building or any other structure," contained in the amending act. *Siler Mill Co. v. Nelson Co* 477

12. MECHANICS' LIENS—FORECLOSURE—DEFICIENCY JUDGMENT—PERSONS LIABLE. In an action to foreclose labor liens against the leaseholds of an oil prospector, for work done under a grubstake contract, the outfitter who furnished portable machinery for the use of the prospector cannot be made personally liable for either costs or attorney's fees, where it had no property to which the liens could attach and was not personally obligated to pay for the services. *Mattocks v. Great Northern R. Co* 44

13. SAME—FORECLOSURE—PERSONAL JUDGMENT. In an action to foreclose a contractor's lien for cutting wood, in which a portion of the claim is found to be lienable, the court has jurisdiction to render a personal judgment for the balance due on the contract. *Gray v. Hickey* 370

14. SAME—INTEREST. Interest is allowable upon an unliquidated claim for a lien against a vessel for the cartage of materials, from the date of filing the complaint, no lien notice being necessary. *Siler Mill Co. v. Nelson Co* 478

MINES AND MINERALS:

Grubstake agreement to drill for oil, see JOINT ADVENTURES, 1.

1. MINES AND MINERALS—LOCATIONS—NOTICE—"VACANT AND UNOCCUPIED"—STATUTES. The purpose of U. S. Rev. Stats., § 2324, and Rem. Code, § 7359, requiring mining locations to be marked upon the ground, being to give notice to prospectors, and being liberally construed in favor of locators, one who for years was familiar with the boundaries of a claim and knew that it had been worked and much money expended in annual assessments, cannot locate the same as "vacant and unoccupied" and assert insufficiency of the prior location notice. *Gold Creek Antimony Mines & Smelter Co. v. Perry* 624

2. SAME—LOCATIONS—FORFEITED GROUND—REQUISITES. One locating mining ground as "vacant and unoccupied," knowing that it was not so, is not entitled to claim as a locator of forfeited ground, with-

MINES AND MINERALS—CONTINUED.

out compliance with Rem. Code, § 7365, requiring relocation notices on claims to abandoned property; hence he is not entitled to show that the last annual assessment of the prior locator was not paid, which fact is immaterial. *Gold Creek Antimony Mines & Smelter Co. v. Perry*..... 624

3. SAME—LOCATIONS—MARKING. As against subsequent locators, a mining location is sufficient when distinctly marked upon the ground so that its boundaries can be readily traced. *Gold Creek Antimony Mines & Smelter Co. v. Perry*..... 624

4. MINES AND MINING—CONTRACTS—GRUBSTAKE—PARTNERSHIP. A contract for prospecting and drilling for oil does not create a partnership, but shows, rather, a common venture in the nature of a "grubstake," in mining parlance, where the outfitter agreed to furnish drilling machinery and make advances for expenses, up to a certain limit, in consideration of which the prospector was to give a half interest in oil leases upon the discovery of oil in paying quantities. *Mattocks v. Great Northern R. Co*..... 44

5. SAME. In such a case, the nature of the contract is not changed by the fact that the operator had the right to obtain further advances from other parties in consideration of a proportional division of returns on the venture, after completion of the advances by the outfitter; and that would not create liability for obligations incurred by the prospector in the prosecution of the work. *Mattocks v. Great Northern R. Co*..... 44

MISREPRESENTATION:

See FRAUD.

MISTAKE:

In entry of judgment, power to correct, see JUDGMENT, 1.
As to measure of damages, see PLEADING, 3.

MITIGATION:

Of damages by property owner, see EMINENT DOMAIN, 8.

MODIFICATION:

Of contract, see CONTRACTS.
Of lease, see LANDLORD AND TENANT, 2.

MONEY:

Appropriation by legislature, see STATES.

MORTGAGES:

Invalidity of attachment as against prior mortgagee, waiver, see ATTACHMENT.
As unlawful preference by insolvent corporation, see CORPORATIONS, 5.

MORTGAGES—CONTINUED.

Apportionment of award as between mortgagor and mortgagee, see EMINENT DOMAIN, 9.

Estoppel to defend foreclosure suit, see ESTOPPEL.

Parol evidence to explain terms of, see EVIDENCE, 4.

By husband or wife, see HUSBAND AND WIFE, 2-4.

By dealer to brewer as conferring "interest in retail business," see INTOXICATING LIQUORS.

Amendment of pleading for mistake in measure of damages for wrongful withholding discharge of satisfied mortgage, see PLEADING, 3.

Penalty for failure to discharge satisfied mortgage as question for court, see TRIAL, 5.

1. MORTGAGES—DISCHARGE—REFUSAL — DAMAGES — STATUTES. Where property was conveyed to a surety company by a trust deed as security for going upon a contractor's bond, and after completion of the work the surety company refused to redeed the property until its value had depreciated, the right of the grantor to recover for the loss by depreciation is limited to the sum of $25 by Rem. Code, § 8799, which provides that a mortgagee failing upon demand for sixty days to discharge a mortgage that has been fully satisfied shall forfeit and pay to the mortgagor the sum of $25, to be recovered in any court of competent jurisdiction; since the effect of the statute is to substitute remedies and the same is intended as compensation to the mortgagor as well as a punishment to the mortgagee, and is not strictly a penalty. *Morrill v. Title Guaranty & Surety Co*... 258

2. SAME—DISCHARGE—TRUST DEED. Where a deed is made to a trustee who holds title as security for a liability, the trustee is held to the same rule that governs mortgages, and must tender a satisfaction piece. *Morrill v. Title Guaranty & Surety Co*..... 258

3. SAME—DISCHARGE—REFUSAL TO GIVE—EXCUSES. Where a trust deed was held by a surety company to secure against liability upon a contractor's bond, a claim for $500 for attorney's fees and costs expended by the surety company in a suit to restrain payments on the contract arises out of an independent proceeding not defined by the deed, and hence is no excuse for withholding a reconveyance of the security after all liability on the bond is fully satisfied. *Morrill v. Title Guaranty & Surety Co*..... 258

4. SAME—DISCHARGE—DAMAGES—ACTIONS — PLEADING. A cross-complaint against a mortgagee for withholding a discharge after satisfaction is not demurrable for mistaking the measure of damages in seeking the amount of the depreciation in the value of the property rather than the statutory penalty. *Morrill v. Title Guaranty & Surety Co*..... 258

5. MORTGAGES—DISCHARGE—REFUSAL — PENALTY — RIGHT OF ACTION—STATUTES. Rem. Code, § 8799, which provides a compensatory pen-

MORTGAGES—CONTINUED.

alty of $25 for a mortgagee's failure to discharge a mortgage that has been fully satisfied, does not give a new right of action, but is merely a substitution of a penalty in the way of damages for the general relief allowed in equity, and affects the measure of damages only. *Morrill v. Title Guaranty & Surety Co.*..... 258

6. MORTGAGES—FORECLOSURE—SUCCESSIVE SALES—STATUTES. It is not necessary to order successive sales when different mortgages are foreclosed in one suit, where the statute, Rem. Code, § 1118, providing that the court shall order the mortgaged property sold to satisfy the mortgage and costs of action, does not require separate sales. *Du Pont De Nemours Powder Co. v. Virges*..... 35

MOTIONS:

In arrest of judgment, appeal by state from order, see CRIMINAL LAW, 11.

New trial in civil actions, see NEW TRIAL, 2.

MOTOR VEHICLES:

Regulation of motor vehicles for hire, see MUNICIPAL CORPORATIONS, 14, 15.

MUNICIPAL CORPORATIONS:

Abolition of civil remedy for injuries sustained by city employee as denial of equal protection of laws, see CONSTITUTIONAL LAW, 5.

Condemnation of property for public improvement, see EMINENT DOMAIN, 2-4.

Exemption of automobiles owned by city from operation of state license law, see LICENSES, 3-5.

Application and scope of industrial insurance act to employees of city, see MASTER AND SERVANT, 9.

Violation of ordinance regulating sale of goods by weight or measure, see WEIGHTS AND MEASURES.

1. MUNICIPAL CORPORATIONS — PUBLIC WORKS — CONTRACTOR'S BOND — LOANS TO CONTRACTOR—LIABILITY. A surety on a contractor's bond given to secure labor and material claims is not liable to a bank financing the work by loaning money to the contractor, unless it is shown that the money loaned was used in the payment of labor, material, or supplies consumed in the construction of the work. *Title Guaranty & Surety Co. v. First National Bank of Hoquiam*..... 55

2. SAME—ADVANCES TO CONTRACTOR — PREFERRED CLAIMS — RIGHTS OF SURETY. A contractor having, before default, assigned to a bank the sums to grow due on a city contract as collateral security for advances, sums due the contractor to the extent of the eighty-five per cent due as the work progresses are to be first applied to the repayment of the advances, making the bank a preferred claimant to that extent; but the bank has no right to participate in the fifteen

MUNICIPAL CORPORATIONS—CONTINUED.

per cent reserve, withheld by the city for the protection of laborers and materialmen, as against creditors or the contractor's surety completing the work and discharging claims. *Title Guaranty & Surety Co. v. First National Bank of Hoquiam*..... 55

3. MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—CONTRACTS—BOND OF CONTRACTOR—LIABILITY—SUPPLIES. A bond given by a contractor to secure payment of laborers and materialmen upon public work and all persons who shall furnish the contractor with "provisions and supplies" for the carrying on of said work, in compliance with Rem. & Bal. Code, § 1159, covers sums due for the rental of a donkey engine furnished to the contractor on city street improvement work. *Title Guaranty & Surety Co. v. First National Bank of Hoquiam*.. 55

4. MUNICIPAL CORPORATIONS — PUBLIC WORKS — CONTRACTOR'S BOND — NOTICE OF CLAIM—SUFFICIENCY. A notice of a labor claim against the contractor's bond for the improvement of the "Humptulips—Quinault County Road," sufficiently describes the work by referring to it as the "Quinault Road," where it was commonly known by that name. *Herren v. Kansas City Casualty Co*..... 77

5. SAME. Where a notice of a labor claim against the contractor's bond sufficiently identifies the improvement and work, neither the county nor the surety can object that the notice is insufficient in not stating exactly the full names of the contractor and surety, where the variance was slight and could not have misled any one. *Herren v. Kansas City Casualty Co*..... 77

6. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS — BENEFITS — PROCEEDINGS—CONCLUSIVENESS. Under the act of 1911, 3 Rem. & Bal. Code, § 7892-1, which confines the power to assess for a local improvement to "property specially benefited thereby" and § 7892-13, requiring the property to be assessed in accordance with the benefits conferred, the declaration in the initial ordinance that the property included in the district is all the property specially benefited, does not preclude the court from inquiring into the question of benefits to the property assessed, as a matter of fact, on appeal under Id., § 7892-22; and in determining the benefits, the court may take into consideration, with the other evidence, the fact that property outside the district was benefited. *Horton Investment Co. v. Seattle*..... 556

7. SAME—LOCAL IMPROVEMENTS—BENEFITS—EVIDENCE. In determining the benefits to property from filling a street, the fact that the fill will be necessary to a new sewer, not then contemplated as any part of the improvement involved, is too remote to serve as a taxable benefit to the property; as a thing which is not a benefit cannot be made the basis of an assessment for benefits. *Horton Investment Co. v. Seattle*..... 556

8. SAME—ASSESSMENTS—EXCESSIVENESS—EVIDENCE. Where forty per cent of the cost of an improvement of a street was for a fill which

MUNICIPAL CORPORATIONS—CONTINUED.

was of no benefit to property assessed for the full cost of the improvement, the assessment is properly reduced to sixty per cent of the cost. *Horton Investment Co. v. Seattle* 556

9. SAME — PROCEEDINGS — BENEFITS — JUDGMENT — RES ADJUDICATA. Where, in proceedings to condemn the right to damage streets by flooding up to a certain level, in which two elements of damage were involved: first, injury to the streets themselves and the cost of restoring them to public use so as to be above the potential water level, and second, the injury to abutters from the raising of the level of the streets above the abutting property, and the city has been paid the award for the damage to the streets, it is under obligation to restore them to public use, and cannot levy special assessments for the same improvement again; at least not without crediting the amount received and showing any necessary additional cost not awarded and collected; and where this was not done, the proceeding and judgment in a former assessment is *res adjudicata* of the question involved and decided therein, and is a bar to any further assessment for raising the level of the street. *In re Shilshole Avenue* 583

10. SAME—PROCEEDINGS — JUDGMENT — PARTIES BOUND. Where a city has been consolidated with another, the latter succeeds to the rights and obligations of the former, as fixed by an award and judgment in condemnation proceedings for a local improvement. *In re Shilshole Avenue* 583

11. MUNICIPAL CORPORATIONS — LOCAL IMPROVEMENTS — ASSESSMENTS—APPEAL—PROCEEDINGS—FINDINGS. Upon appeal from an assessment for benefits for a local improvement under the act of 1911 (3 Rem. & Bal. Code, § 7892-22), providing for trial without a jury and that the court shall confirm, correct, modify or annul the assessment, the appeal vests the court with plenary jurisdiction of the whole question of special benefits, to be tried upon evidence, and findings of fact are not only appropriate but necessary unless waived. *In re Shilshole Avenue* 583

12. SAME—LOCAL IMPROVEMENTS—ASSESSMENTS—REVIEW—LEGISLATIVE AND JUDICIAL QUESTIONS. Under 3 Rem. & Bal. Code, § 7892-13, which provides that the property within a local improvement district shall be considered and held to be all the property specially benefited and shall be assessed to pay the cost, or such part thereof as may be chargeable against the property benefited, the legislative determination by a city council of public necessity has no bearing upon the question of special benefits, which is a judicial question, under Const., art. 7, § 9, vesting the corporate authorities with the power to make local improvements by special assessment or taxation, and under the statute, Id., §§ 7892-21, 7892-22, providing for a judicial review of the question of benefits. *In re Shilshole Avenue* 583

MUNICIPAL CORPORATIONS—CONTINUED.

13. SAME. The only questions to be reviewed under such statutes are the questions of direct or special benefits and the amount thereof on the property included within the district; and property not benefited cannot be assessed, nor can property be assessed for more than it is benefited. *In re Shilshole Avenue*..... 583

14. MUNICIPAL CORPORATIONS—USE OF STREETS—AUTOMOBILES—LICENSE —STATUTES—PROVISO—CONSTRUCTION. A proviso attached to an act not being a part of the enacting words, but a restraint upon or exception to some part of it, the proviso to the act relating to permits for others than street railways, etc., for the operation of motor vehicles for hire in "a city of the first class," Rem. Code, § 5562-37, to the effect that the act shall include interurban railways transporting passengers for hire in any motor propelled vehicle except street cars "along any street, road or highway in the state," does not have the effect of enlarging the act to cover motor vehicles operated by private individuals for hire on highways outside the limits of cities of the first class. *Bartlett v. Lanphier*..... 354

15. SAME—USE OF STREETS—AUTOMOBILES—LICENSES—BONDS — LIABILITY—STATUTES. Under Rem. Code, §§ 5562-37, 5562-38, requiring a permit and bond for the operation of motor vehicles for hire in cities of the first class, liability on their bond for injuries received due to negligent operation is limited to injuries which occur within the limits of such city, in view of the dominant purpose of the act to regulate only operation in cities of the first class and to require no permits for cars operating outside of such limits. *Bartlett v. Lanphier* 354

16. MUNICIPAL CORPORATIONS—STREETS—SIDEWALKS — SNOW AND ICE—LIABILITY OF OWNERS—COMPLAINT. A complaint charging that defendant "carelessly, negligently and unlawfully" allowed snow and ice to accumulate upon its sidewalk, states only a conclusion and is insufficient, where the facts alleged show that the snow and ice accumulated in a short time through natural causes, and no ordinance was pleaded making it the duty of defendant to keep the sidewalk clear of snow and ice. *Zellers v. Seattle Lodge No. 92 Benevolent and Protective Order of Elks*..... 32

17. SAME—LIABILITY OF OWNER. The abutting owner owes no duty to pedestrians to keep the sidewalk free from snow and ice, in the absence of any statute or ordinance requiring him to do so. *Zellers v. Seattle Lodge No. 92 Benevolent and Protective Order of Elks*.. 32

18. SAME—DEFECTIVE STREETS — CITY'S NOTICE OF DEFECT — EVIDENCE. There is sufficient evidence that the city had notice of a defect in an iron grating in a pavement, where it appears that the grating was broken and out of repair in June, and the city employees cleaned it nearly every day until November, and there was no evidence that it had been changed. *Lichtenberg v. Seattle*..... 391

MUNICIPAL CORPORATIONS—CONTINUED.

19. MUNICIPAL CORPORATIONS — USE OF STREETS — AUTOMOBILES—ACCIDENTS AT CROSSINGS — NEGLIGENCE — EVIDENCE — SUFFICIENCY. It is clearly negligence for defendant to drive his car into plaintiff's car at a crossing, where plaintiff, having first entered the street intersection, had the right of way, and his car was in view, and defendant could have readily stopped in time, had he looked and seen plaintiff's car. *Yuill v. Berryman*..... 458

20. MUNICIPAL CORPORATIONS—STREETS — DEFECTS — BRIDGE RAILING — NEGLIGENCE — PROXIMATE CAUSE. A municipal corporation is not liable for injuries sustained when the steering gear of plaintiff's automobile refused to work, and the car, driven at slow speed, crossed the curb and sidewalk and went through the low wooden railing of a bridge at the side of the street; since the street was reasonably safe for ordinary travel, and there is no absolute duty to maintain railings in the absence of obvious danger, and the proximate cause of the accident was the defect in the automobile. *Swain v. Spokane* 616

21. MUNICIPAL CORPORATIONS — STREETS — ACCIDENTS AT CROSSINGS — AUTOMOBILE COLLISION—PROXIMATE CAUSE—CONCURRENT NEGLIGENCE—QUESTION FOR JURY. As there may be more than one proximate cause for an accident, and where the independent negligence of different persons concurs, all may be liable; and as proximate cause is a mixed question of law and fact and for the jury unless the facts are undisputed and the inferences plain, it is error to decide, as a matter of law, that the act of defendant C. in colliding with plaintiff's automobile was the proximate cause of the accident, and that defendant laundry company would therefore not be liable, where it appeared from the complaint and statement of counsel that defendant C., who was approaching a street intersection at an unlawful speed, was compelled to turn suddenly into plaintiff's car when the laundry company's auto truck, also going at an excessive speed, unlawfully cut the corner at the street intersection and got in the path of the car of defendant C.; since what a reasonably prudent person will do in a sudden emergency is always a question for the jury, unless reasonable minds cannot differ thereon. *Hellan v. Supply Laundry Co.* 683

22. SAME. In such a case, the probability of an injury need not be so obvious as to be necessarily anticipated by the wrongdoer, who is liable for any injuries proximately resulting if his act was one that in the exercise of ordinary care he ought to have anticipated was apt to result in injury to others, although he could not have anticipated the particular injury. *Hellan v. Supply Laundry Co.*. 683

23. MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. In an action for personal injuries sustained in a fall when plaintiff stepped from a bus to the pavement, the fact of stepping upon a defective iron grating in the pavement, which was the proximate cause of the accident,

MUNICIPAL CORPORATIONS—CONTINUED.

is not left to speculation or conjecture, but is properly a question for the jury, where it appears that the grating was between the bus and the sidewalk, that it was broken and covered with trash, that the plaintiff stepped on something that gave way and caught her foot, and caused her to fall upon the edge of the sidewalk. *Lichtenberg v. Seattle* 391

24. MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The contributory negligence of the plaintiff in stepping from a jitney bus onto a defective iron grating in the pavement is a question for the jury, where it appears that the grating was between the bus and the sidewalk, that it was covered with trash, and the plaintiff could not see the defect. *Lichtenberg v. Seattle* 391

25. MUNICIPAL CORPORATIONS — USE OF STREETS — AUTOMOBILES — COLLISION—CONTRIBUTORY NEGLIGENCE. An employee of a street car company required to work in the line of traffic in a street, clearing snow and ice from the rails at a switch, is not guilty of contributory negligence in failing to keep a lookout, where he was struck by an automobile while his back was turned, and there was evidence that no horn was blown, the automobile lamps were not lit, and the car could have been stopped within seven or eight feet if the driver had seen the plaintiff. *Morrison v. Conley Taxicab Co*..... 436

26. MUNICIPAL CORPORATIONS — USE OF STREETS — CONTRIBUTORY NEGLIGENCE—TRAFFIC ORDINANCE—VIOLATION. Failure to observe a traffic ordinance providing that vehicles, in passing, shall keep as near the right hand curb as possible, does not render one guilty of contributory negligence, *per se*, in driving into an obstruction near the center of the street in the nighttime, where there was no passing traffic and no injury resulted to any one for whose benefit the ordinance was passed. *Rampon v. Washington Water Power Co*..... 438

27. MUNICIPAL CORPORATIONS — STREETS — ACCIDENTS AT CROSSINGS — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. The driver of a team, struck by an automobile at a street intersection in the residential district of a city, is not guilty of contributory negligence, as a matter of law, where there was evidence to the effect that he was driving at a speed of six or seven miles an hour, in a direction which, under a traffic ordinance, gave him the right of way, and was struck by an automobile exceeding the speed limit. *Shilliam v. Newman* 637

28. MUNICIPAL CORPORATIONS — POWERS — COMPROMISE OF INVALID CLAIMS. Where the state has abolished civil actions for personal injuries by city employees in the course of their employment and relegated them to the provisions made for them by the city, the city council has no power to compromise civil actions brought for such damages but their power is as defined and limited in the statutes and charter. *State ex rel. Fletcher v. Carroll*..... 531

MURDER:

See Homicide.

NAMES:

See Trade-Marks and Trade-Names.

NECESSITY:

Of bond to support appeal from separate judgment in favor of co-defendant, see Appeal and Error, 8, 9.

For hearing to order summary punishment for contempt of court, see Contempt, 3.

For condemnation of property for public use, see Eminent Domain, 1.

Of specific appropriation of funds to pay awards in condemnation by state, see Eminent Domain, 5.

For notice to owner of materials furnished, see Mechanics' Liens, 10.

NEGLIGENCE:

Of bailee for hire, see Bailment.

Of carrier, see Carriers, 6.

In maintenance of county road, see Highways.

Contributory negligence of servant as question for jury, see Master and Servant, 10.

Of employer, see Master and Servant, 11, 12.

Cause of personal injuries in city street, see Municipal Corporations, 16-27.

In killing stock on track, see Railroads, 9, 10.

Collision between automobile and street car, see Street Railroads.

NEGOTIABLE INSTRUMENTS:

See Bills and Notes.

NEW TRIAL:

Necessity of objections for purpose of review, see Appeal and Error, 8.

Review of discretion in ruling on, see Appeal and Error, 22.

1. New Trial—Conflicting Evidence. The improbability of contradictory evidence is not ground for a new trial, where the jury was capable of passing on the same. *Jensen v. Lawrence*..... 148

2. New Trial—Time for Motion. Under Rem. Code, § 402, providing that a motion for a new trial must be made within two days after the verdict, a motion for new trial made more than two years after the verdict cannot be considered. *Vermont Farm Machine Co. v. Lamka* 622

NOMINATION:

For office, see Elections.

NOTES:

Promissory notes, see BILLS AND NOTES.

NOTICE:

Of appeal, see APPEAL AND ERROR, 5-7.
Of amendment to schedule of property, see BANKRUPTCY, 2.
Of insolvency by corporate officers, see CORPORATIONS, 4.
Of mechanics' lien, description of property, see MECHANICS' LIENS, 10, 11.
Of mining location, see MINES AND MINERALS, 1-3.
Of claim against contractor's bond, see MUNICIPAL CORPORATIONS, 4, 5.
Of defects in street, see MUNICIPAL CORPORATIONS, 18.

NUISANCE:

Abatement of, see PROSTITUTION.

OBJECTIONS:

Necessity for purpose of review, see APPEAL AND ERROR, 2, 3.
To evidence, see TRIAL, 4.

OBSTRUCTIONS:

Of highways, see HIGHWAYS.

OFFER:

Of proof, see TRIAL, 3.

OFFICERS:

Notice of insolvency, preferences to officers, see CORPORATIONS, 4.

OILS:

Oil inspection law as regulation of interstate commerce, see COMMERCE.
Levy of inspection tax as taking of property without due process of law, see CONSTITUTIONAL LAW, 4.
Fees for inspection of as violating inhibition to lay imposts or duties on imports or exports, see CUSTOMS DUTIES.
Oil inspection tax, see LICENSES, 1, 2.
Grubstake contract to prospect and drill for oil, see MINES AND MINERALS, 4, 5.

OPINION EVIDENCE:

In civil actions, see EVIDENCE, 5.

OPTION:

Of payee to declare note due and payable, see BILLS AND NOTES, 1, 2.
For sale of real estate as within statute, see FRAUDS, STATUTE OF, 1.
Conveyance of property under option agreement as affecting lien of judgments against grantors, see JUDGMENT, 4.

ORAL CONTRACTS:

See FRAUDS, STATUTE OF.

ORDERS:

Appeal by state from order granting motion in arrest of judgment, see CRIMINAL LAW, 11.

ORDINANCES:

Municipal ordinances, see MUNICIPAL CORPORATIONS, 6, 26.
Regulating sales of commodity by weight, see WEIGHTS AND MEASURES.

OVERHEAD EXPENSE:

Allowance of under profit-sharing contract, see JOINT ADVENTURES, 3.

OWNERSHIP:

Of stock in insolvent corporation, sufficiency of evidence, see CORPORATIONS, 2.

PARENT AND CHILD:

Right of child to recover for death of parent, see DEATH.

PAROL CONTRACTS:

See FRAUDS, STATUTE OF.

PAROL EVIDENCE:

In civil actions, see EVIDENCE, 4.

PARTICULARS:

Bill of, see PLEADING, 5.

PARTIES:

Requiring bond on appeal, see APPEAL AND ERROR, 8, 9.
To be served with statement of facts, see APPEAL AND ERROR, 13.
Rights and liabilities as to costs, see COSTS, 3.
Entitled to sue for causing death, see DEATH.
In proceeding to compel state auditor to issue warrant for award in condemnation for state road, see EMINENT DOMAIN, 12.
Admissions as evidence, see EVIDENCE, 2, 3.
Concluded by recitals in judgment, see JUDGMENT, 2.
Persons entitled to mechanics' lien, see MECHANICS' LIENS.
Liability for deficiency judgment on foreclosure of lien, see MECHANICS' LIENS, 12.
Bound by judgment in condemnation proceedings for public improvement, see MUNICIPAL CORPORATIONS, 10.
Right of vendee in conditional sales contract to sue as "real party in interest" for damage to property, see SALES, 7.
Entitled to trade-mark, see TRADE-MARKS AND TRADE-NAMES.

1. PARTIES — "REAL PARTY IN INTEREST" — PARTIES INSURED AGAINST LOSS. It is no defense to an action against a wrongdoer that the

PARTIES—CONTINUED.

plaintiff was insured against the loss by an employers' liability policy and had recovered the amount of the loss from the insurance company; and hence the plaintiff may maintain the action as the real party in interest, within the meaning of Rem. Code, § 179, especially where the insurance company was a mutual company and plaintiff must contribute to the insurance fund. *Alaska Pacific Steamship Co. v. Sperry Flour Co*..... 227

PARTNERSHIP:

Agreements for, see JOINT ADVENTURES.

Contracts creating relation, see MINES AND MINERALS, 4, 5.

1. PARTNERSHIP — CROPPING CONTRACT — CONSTRUCTION. Under a contract of partnership by which M. and R. were to be half partners in a crop, M. to put in his work and R. to furnish a man against him, and to have a reasonable price for the use of his horses and machinery and for boarding the men, M. was entitled to the reasonable value of his labor, but not for his own board while working for the firm. *Marks v. Reed*..... 446

PASSENGERS:

Carriage of, see CARRIERS, 6.

PAYMENT:

Bill of exchange or promissory note, see BILLS AND NOTES, 1, 4-6.

Compensation for property taken or damaged for public use, see EMINENT DOMAIN, 5, 10-13.

Authorizing payment to contractor as estoppel to claim lien, see MECHANICS' LIENS, 5.

Assurance as to payment of note as discharging surety, see PRINCIPAL AND SURETY, 3.

Extension of time for payment of note as discharging surety, see PRINCIPAL AND SURETY, 4.

Of claims by receiver, see RECEIVERS, 2.

Voluntary payments as consideration for release, see RELEASE, 1.

Of specific legacy, see WILLS.

PENALTIES:

For failure to furnish cars to shippers, see CARRIERS, 1-5.

For failure of mortgagee to discharge mortgage after satisfaction, see MORTGAGES, 1, 5.

PENDENCY OF ACTION:

See ABATEMENT AND REVIVAL.

PERFORMANCE:

Of contract for exchange of properties, see BROKERS.

Part performance as affecting statute, see FRAUDS, STATUTE OF, 1, 2.

PERFORMANCE—CONTINUED.

Of contract of sale, see SALES, 4.

Ability to perform as affecting right to enforce contract, see SPECIFIC PERFORMANCE, 2.

PERSONAL INJURIES:

To passenger, see CARRIERS, 6.

Abolition of civil remedy for injuries sustained by city employee as denial of equal protection of laws, see CONSTITUTIONAL LAW, 5.

To traveler on highway, see HIGHWAYS.

To employee, see MASTER AND SERVANT.

To person on city street, see MUNICIPAL CORPORATIONS, 16-27.

To city employee, see MUNICIPAL CORPORATIONS, 28.

Release of damages for, see RELEASE.

Caused by collision between taxicab and street car, see STREET RAILROADS, 2.

PHYSICIANS AND SURGEONS:

1. PHYSICIANS AND SURGEONS—PRIVILEGED COMMUNICATIONS—LIABILITY. A physician is not liable for disclosing confidential communications by testifying on the witness stand, if the testimony complained of was admissible in the case in which it was given and was relevant and pertinent to the issues; nor if compelled to give the testimony by rulings of the court. *Smith v. Driscoll*..... 441

2. SAME—PLEADING—COMPLAINT. In such a case, a complaint for damages is demurrable where it fails to negative the *prima facie* presumption that the testimony was privileged by alleging that the statements complained of were not admissible and were not relevant or pertinent to the issues; or where it shows that the testimony was given in response to questions in obedience to rulings of the court. *Smith v. Driscoll*..... 441

PLEADING:

See LIBEL AND SLANDER, 1.

Amendment as affecting original amount in controversy, see APPEAL AND ERROR, 1.

Amendment on appeal, see APPEAL AND ERROR, 18-20.

Harmless error in rulings on, see APPEAL AND ERROR, 27, 29, 30.

On note, see BILLS AND NOTES, 6.

Condemnation proceedings, see EMINENT DOMAIN, 13.

Indictment or criminal information or complaint, see INDICTMENT AND INFORMATION.

In cross-complaint against mortgagee for withholding discharge after satisfaction, see MORTGAGES, 4.

Complaint in action for injuries from snow and ice on sidewalk, see MUNICIPAL CORPORATIONS, 16.

In action for wrongful disclosure of privileged communications, see PHYSICIANS AND SURGEONS, 2.

Amendment of, see STATUTES, 2.

PLEADING—CONTINUED.

1. PLEADING—COMPLAINT—DESIGNATION OF ACTION. Where the facts stated in a complaint entitled the plaintiff to relief, it is immaterial by what name the action was called. *Smith v. Driscoll*..... 441

2. PLEADING—ANSWER—DENIAL. A denial on information and belief of the filing with the city clerk of a claim against a contractor's bond to secure laborers and materialmen is insufficient to present an issue. *Title Guaranty & Surety Co. v. First National Bank of Hoquiam* 55

3. PLEADING—AMENDMENT—DEPARTURE—MISTAKE AS TO MEASURE OF DAMAGES—MORTGAGES—DISCHARGE. Where a cross-complaint against a mortgagee for wrongfully withholding a discharge of a satisfied mortgage sets forth all the facts necessary for a recovery of the penalty provided by Rem. Code, § 8799, but asks judgment for the loss sustained by reason of a depreciation in the value of the property, thus mistaking the measure of damages, it is not a departure to treat the cross-complaint as amended and give judgment for the penalty, although the statute was not pleaded; since there was but one state of facts to be pleaded and no choice of remedies, and the measure of damages was a question of law and not of fact, error as to which does not turn a litigant out of court. *Morrill v. Title Guaranty & Surety Co*..... 258

4. PLEADING—TRIAL—AMENDMENT—DISCRETION. Where a complaint alleges generally the effect of the laws of a foreign state, it is discretionary to allow a trial amendment setting forth the specific law relied upon. *Lipsett v. Dettering*..... 629

5. PLEADING—BILL OF PARTICULARS. Where the specific damages are set forth with exactness, a bill of particulars cannot be required, since its function is not to set forth the cause of action. *Eckhart v. Peterson* 379

6. PLEADING—MATERIAL VARIANCE—DAMAGES. Where the complaint in a civil action for rape specifically sets forth the damages claimed with all the exactness of a bill of particulars, it is error to admit, over the objection of the plaintiff, evidence of other injuries received in the assault such as severe injuries to the arm and displacement of the womb not alleged in the complaint. *Eckhart v. Peterson*. 379

7. PLEADING—ISSUES AND PROOF—VARIANCE. In an action for personal injuries sustained in a fall on a disembarking stairway, it is not a material variance that the complaint alleged a brass nosing on the edge of the step had been suffered to become loose, and the proof showed that it was insufficiently secured. *Henry v. Navy Yard Route* 526

POISON:

Sale of poison without label, see HOMICIDE, 1, 3, 4.

POSSESSION:

Of money or papers received by attorney in course of employment, recovery by client, see ATTORNEY AND CLIENT.

POWERS:

Delegation of legislative and judicial powers on public service commission, see CARRIERS, 1, 2.
Of courts to question purpose or motive of legislative action, see CONSTITUTIONAL LAW, 1.
Of canvassing boards, see ELECTIONS.
Of city to compromise invalid claims for damages, see MUNICIPAL CORPORATIONS, 28.
Of agent, see PRINCIPAL AND AGENT, 2.
Of court to correct judgment, see JUDGMENT, 1.
Of industrial insurance commission, see MASTER AND SERVANT, 6, 7.

PRACTICE:

See APPEAL AND ERROR; COSTS; CRIMINAL LAW; EVIDENCE; JUDGMENT; PLEADING; TRIAL.
Prosecution of actions in general, see ACTION.

PREFERENCES:

By insolvent corporation, see CORPORATIONS, 4, 5.

PREJUDICE:

Ground for reversal in civil actions, see APPEAL AND ERROR, 27-37.
Ground for reversal in criminal actions, see CRIMINAL LAW, 15-17.

PREMIUMS:

On replevin bond as costs, see COSTS, 1.

PRESENTMENT:

Of claims against estate of decedent, see EXECUTORS AND ADMINISTRATORS, 2-4.

PRESUMPTIONS:

On appeal, see APPEAL AND ERROR, 21.
On appeal from judgment of contempt of court, see CONTEMPT, 5.

PRINCIPAL AND ACCESSORY:

See CRIMINAL LAW, 2.

PRINCIPAL AND AGENT:

See BROKERS.
Embezzlement by agent, see EMBEZZLEMENT, 1.
Liability of owner for acts of contractor in giving worthless check to materialman, see MECHANICS' LIENS, 6.

1. PRINCIPAL AND AGENT—AGENCY—EVIDENCE—SUFFICIENCY. The evidence supports a finding that a bank officer acted as agent of the

PRINCIPAL AND AGENT—CONTINUED.

purchaser of timber in making an inspection, where, in response to a request for advice, he wired that he would visit the coast, investigate the matter, and report fully. *Schulze v. Buckeye Lumber Co.* 520

2. PRINCIPAL AND AGENT — RELATION — AUTHORITY. A prospector's foreman in charge of oil drilling under a grubstake contract, with authority to hire men who, under the contract, were to be paid by the prospector, has no power to bind the outfitter by representations that the men were to look to the outfitter for their pay. *Mattocks v. Great Northern R. Co.* 44

PRINCIPAL AND SURETY:

Liabilities of sureties on bonds in legal proceedings, see ATTACHMENT.

Surety on contractor's bond for performance of public improvement, see MUNICIPAL CORPORATIONS, 1-5.

Extent of liability of surety on bond for operation of motor vehicles for hire in cities of first class, see MUNICIPAL CORPORATIONS, 15.

1. PRINCIPAL AND SURETY—CONSIDERATION. The consideration for a promissory note which moves to the principal is sufficient to sustain the obligation against a surety on the note. *Farmers State Bank v. Gray* 431

2. SAME — RELEASE OF SURETY — DEALING WITH COLLATERAL. The surety upon a promissory note is not released because of improper dealings with securities, which were merely placed in the possession of the cashier of the payee in trust for the purpose of realizing upon them, upon the understanding that they would be returned if they were not realized on, which was done. *Farmers State Bank v. Gray* 431

3. SAME—RELEASE OF SURETY—COLLATERAL—PREVENTING ACTION TO COMPEL APPLICATION. A surety on a promissory note is not released by the assurance of the attorney for the holder that the note would be paid, whereby he failed to bring an action to compel the application of the collateral, where the assurance was contingent upon realizing upon the collateral, and the condition was not fulfilled; especially where the attorney did not appear to have possession of the notes or authority to make the assurance. *Farmers State Bank v. Gray* 431

4. PRINCIPAL AND SURETY—RELEASE—EXTENSION OF TIME. An agreement between the payee and the principal maker of a note to extend the time of payment for one year, releases the surety on the note, if the agreement is made upon a valuable consideration and without the consent of the surety. *Lipsett v. Dettering* 629

PRIORITIES:

Of action, as bar, see ABATEMENT AND REVIVAL, 1.
Of garnishment, see GARNISHMENT, 1, 2.

PRIVILEGED COMMUNICATIONS:

Liability of physician for wrongful disclosure of, see PHYSICIANS AND SURGEONS.

PRIVILEGE TAX:

See LICENSES, 1.

PROCESS:

On appeal, see APPEAL AND ERROR, 5-7.

PROFITS:

Agreement to share "net profits," see JOINT ADVENTURES, 2-4.

PROHIBITION:

Effect of prohibition law on saloon lease, see LANDLORD AND TENANT, 4, 5.

PROMISSORY NOTES:

See BILLS AND NOTES.

PROPERTY:

See BANKRUPTCY.
Recovery by client of property in hands of attorney, see ATTORNEY AND CLIENT.
Negligence of bailee in care of, see BAILMENT.
Taking or damaging for public use, see EMINENT DOMAIN.
Subject to garnishment, see GARNISHMENT, 1.
Subject to lien of judgment, see JUDGMENT, 4.
Taxes on property, see LICENSES, 1, 2, 4.
Subject to mechanics' lien, see MECHANICS' LIENS, 3.

PROSTITUTION:

1. PROSTITUTION — NUISANCES — ABATEMENT — ACTIONS — DEFENSES — TEMPORARY CESSATION. Under the "Red Light" law, Rem. Code, § 946-2, which provides for an action of abatement, "whenever a nuisance exists," and Id., § 946-8, authorizing a fine against any owner of a building used for prohibited purposes whenever a permanent injunction issues in such action, it is not a defense to the action that the property was not being used for the purposes of prostitution at the time the action of abatement was commenced nor since, where it appears that the owners knew it was being so used and made no effort to abate the nuisance after arrests had been made, nor until after the commencement of the abatement action; a temporary cessation of unlawful practices not being sufficient where it is presumable that they would have been continued but for the abatement action. *State ex rel. Lundin v. Humphrey*..... 599

PROVINCE OF COURT AND JURY:

In civil actions, see TRIAL, 5.

PROVISOS:

To act requiring permit and bond for operation of motor vehicles for hire in cities of first class, see MUNICIPAL CORPORATIONS, 14.

PROXIMATE CAUSE:

Of accident, see MUNICIPAL CORPORATIONS, 20-23.

PUBLIC IMPROVEMENTS:

By municipalities, see MUNICIPAL CORPORATIONS, 1-8, 11-13.

PUBLIC SERVICE COMMISSION:

Laws empowering fixing of reciprocal demurrage charges as delegation of legislative power, see CARRIERS, 1.

Power to charge costs of construction against railroad desiring to cross other line at grade, see RAILROADS, 4.

PUBLIC USE:

Taking property for public use, see EMINENT DOMAIN.

PUNISHMENT:

For contempt of court, see CONTEMPT, 4.

QUALIFICATIONS:

Of expert witness, see EVIDENCE, 5.

QUESTION FOR JURY:

In action for injury to servant, see MASTER AND SERVANT, 10.

Proximate cause of accident, see MUNICIPAL CORPORATIONS, 21.

Contributory negligence of person injured as question for jury, see MUNICIPAL CORPORATIONS, 23, 24, 27.

QUIETING TITLE:

Rights of purchaser from trustee to quiet title against fraudulent grantee, see BANKRUPTCY, 3, 4.

RAILROADS:

Carriage of goods and passengers, see CARRIERS, 1-5.

As employers, see MASTER AND SERVANT, 11, 12.

Conditional sales of railroad equipment, recording, see SALES, 8.

In city streets, see STREET RAILROADS.

1. RAILROADS—CROSSINGS—COST OF CONSTRUCTION AND MAINTENANCE—SAFETY DEVICES—APPORTIONMENT—STATUTES. Rem. Code, § 8733-6, subd. c, providing that the portion of the expense of making a railroad crossing at grade not chargeable to a county or city shall be apportioned between the railroad companies, means not only the ex-

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pense of constructing the actual crossing, but the expense of constructing and maintaining such protective devices mentioned in § 8733-3 as the public service commission may require. *State ex rel. Puget Sound & Willapa Harbor R. Co. v. Northern Pac. R. Co...* 10

2. SAME—CROSSINGS—COST OF SAFETY DEVICES. In the absence of a statute to the contrary, a railroad desiring to cross another at grade must bear the expense of the crossing, including the cost of installing and maintaining such safety devices as the necessities of the case require. *State ex rel. Puget Sound & Willapa Harbor R. Co. v. Northern Pac. R. Co.....* 10

3. SAME—CROSSINGS—SAFETY APPLIANCES—COSTS—APPORTIONMENT—DUE PROCESS. The railroad company first in time takes its right subject to being crossed by the line of another railway; and hence it is within the power of the state to impose upon a railroad company whose line is crossed at grade by another line the duty of installing and maintaining such safety devices as the conditions require for the safety of the public, and Rem. Code, § 833-6, subd. c, requiring an apportionment of the costs thereof between the railroad companies does not violate the constitutional inhibition against taking private property for public use without compensation. *State ex rel. Puget Sound & Willapa Harbor R. Co. v. Northern Pac. R. Co...* 10

4. SAME. Under Rem. Code, § 8733-6, subd. c, providing that the portion of the expense of making a railroad crossing at grade not chargeable to a county or city shall be apportioned between the railroad companies, the public service commission cannot charge the entire cost against the road desiring the crossing, merely because the older company was first in point of time, where the record shows no equity in favor of one road over the other; since to require one road to bear all the expense is not an "apportionment." *State ex rel. Puget Sound & Willapa Harbor R. Co. v. Northern Pac. R. Co...* 10

5. RAILROADS—CONSTRUCTION—CONTRACTS—"GRUBBING." "Grubbing" in a railroad construction contract means taking out the roots, stumps and obstacles imbedded in the surface of the ground along the right of way, except where not required on account of cuts and fills; and where, under the contract, the cuts referred to were to be of more than three feet, and the fills of more than two feet, the contractor cannot be allowed for work on stations already cleared in which the cuts and fills exceeded the stipulated requirements; since there was no grubbing to be done on such stations. *Cervien v. Erickson Construction Co.....* 500

6. SAME — CONSTRUCTION — CONTRACTS — DECISION OF ARBITRATOR. A provision in the contract for grubbing railroad right of way that the chief engineer of the company shall be the final arbiter of all disputes under the contract, is conclusive and binding unless the

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decision of the arbitrator has been made arbitrarily and capriciously. *Cervien v. Erickson Construction Co.*..... 500

7. RAILROADS—CONTRACTOR'S BOND—LIENS — FILING — STATUTES. Until filed in the county auditor's office, there is no statutory liability upon a bond given by a railroad company to relieve its property from liens for labor and materials furnished to a contractor, as provided in Rem. Code, § 1129; and after the bond is taken and filed, the filing of a lien for labor or material furnished is unnecessary. *Du Pont De Nemours Powder Co. v. National Surety Co.*.. 461

8. SAME—CONTRACTOR'S BOND—ACTIONS — PRIVITY. There being no privity between the parties, laborers and materialmen cannot maintain an action at common law upon a statutory bond given by a railroad company to relieve its property from liens for labor and material, as provided in Rem. Code, § 1129, the bond not having taken effect as a statutory bond because not filed as required by law (overruling in part, on rehearing, Id., 90 Wash. 227). *Du Pont De Nemours Powder Co. v. National Surety Co.*..... 461

9. RAILROADS—ANIMALS ON TRACK—NEGLIGENCE — EVIDENCE — SUFFICIENCY. The jury is warranted in finding negligence by a railroad company in killing a horse on the tracks within yard limits where fences were not required, although the horse was a trespasser, where it appears that the horse was seen by the fireman of a passenger train when about five hundred feet distant, and that there was evidence that the train might have been stopped within that distance. *Willett v. Oregon-Washington R. & Nav. Co.*..... 71

10. SAME—ANIMALS ON TRACK—CONTRIBUTORY NEGLIGENCE—EVIDENCE —SUFFICIENCY. Where the law prohibiting stock from running at large was not in force, it is not contributory negligence, as a matter of law, for a man to turn his horses out on the common where they could go upon unfenced railroad tracks, where it appears that he lived about a mile away and the horses had been in the habit of grazing in the other direction and had not theretofore gone upon the tracks. *Willett v. Oregon-Washington R. & Nav. Co.*..... 71

RAPE:

Admissions as evidence in civil action for, see EVIDENCE, 2.

1. RAPE—CIVIL LIABILITY — EVIDENCE — SUFFICIENCY. The evidence in a civil action for assault and rape is not insufficient to sustain a verdict from the fact that plaintiff made no outcry, where she testified that she resisted and was overcome by force and that there was intercourse against her consent. *Jensen v. Lawrence*..... 148

2. SAME—DEFENSES—FAILURE TO MAKE OUTCRY. In a civil action for rape, the failure of the plaintiff to make an outcry, or complaint within a reasonable time, may be explained or excused, and is merely

RAPE—CONTINUED.

a circumstance which the jury may consider as tending to impeach the plaintiff, and not a defense as a matter of law. *Jensen v. Lawrence* 148

3. SAME—CIVIL LIABILITY—DEFENSE—INCONTINENCE. In a civil action for rape, evidence of incontinence with other men is not admissible. *Eckhart v. Peterson* 379

4. RAPE—CIVIL LIABILITY—EVIDENCE—CORROBORATION. In a civil action for assault and rape, it is not essential that the plaintiff be corroborated, since the repeal of Laws 1913, p. 298, § 1, requiring corroboration in criminal cases. *Jensen v. Lawrence* 148

5. RAPE—CIVIL LIABILITY—DAMAGES—ISSUES—PATERNITY OF CHILD—EVIDENCE—ADMISSIBILITY. In a civil action for rape in which damages are claimed on account of the alleged pregnancy of the plaintiff, the paternity of the child is directly in issue and evidence is admissible tending to show that the plaintiff had had criminal relations with any other person than the defendant at about the time that the child must have been conceived. *Eckhart v. Peterson* 379

6. SAME. In such a case, a question, on cross-examination of the plaintiff as to whether she had had intercourse with any other man must be limited as to time. *Eckhart v. Peterson* 379

7. RAPE — CIVIL LIABILITY — EVIDENCE — ADMISSIBILITY — EXHIBITS. Upon an issue as to the paternity of a baby, in an action for rape, the baby cannot be made an exhibit, and its resemblance to its alleged father is too indistinct and uncertain to have any probative force. *Eckhart v. Peterson* 379

8. SAME—CIVIL LIABILITY—INSTRUCTIONS. In a civil action for assault and rape, the issue is properly submitted by an instruction defining an unlawful assault and defining rape and making the liability depend upon whether the defendant wrongfully and unlawfully committed the act of criminal intercourse upon plaintiff without her consent. *Jensen v. Lawrence* 148

9. SAME. In such an action, a requested instruction to the effect that plaintiff could not recover if she had been guilty of improper conduct intended to attract the defendant's attention, is properly refused, where he might have been guilty of the rape notwithstanding that circumstance. *Jensen v. Lawrence* 148

10. SAME—CIVIL LIABILITY—DAMAGES. A verdict for $5,000 damages for assault and rape is not so excessive as to be evidence of passion or prejudice. *Jensen v. Lawrence* 148

RATIFICATION:

Of mortgage by wife, see HUSBAND AND WIFE, 3, 4.

READJUSTMENT:

Of buildings by owner in contemplation of second condemnation, see EMINENT DOMAIN, 8.

REAL ESTATE AGENTS:

See BROKERS.

REAL PROPERTY:

Oral rescission of option for sale of real estate, see FRAUDS, STATUTE OF, 1.

REASONABLE DOUBT:

Instructions, see CRIMINAL LAW, 13.

RECEIVERS:

Review of discretion in appointing receiver *pendente lite*, see APPEAL AND ERROR, 23.

1. RECEIVERS—APPOINTMENT—CROPS. A *prima facie* case for the appointment of a receiver *pendente lite* is made out, where a cotenant was endeavoring to take charge of certain crops lying in the field at the mercy of the elements, and refused to make any statement or account for the same. *Womach v. Sandygren*..... 256

2. RECEIVERS—DISCHARGE — EXHAUSTING ESTATE. Where a receiver had completely exhausted the estate in complying with prior orders, he cannot be required to pay a claim filed with his attorney of which he had no notice prior to his discharge, the impossibility of paying as receiver being due to no fault of his own. *Gustav v. Esary*... 248

RECEIVING STOLEN GOODS:

See LARCENY.

1. RECEIVING STOLEN GOODS—INFORMATION—SUFFICIENCY — NAME OF OWNER—STATUTES. Under Rem. Code, § 2601, making it larceny for any person, with intent to deprive the owner thereof, . . . knowing the same to have been so appropriated, to . . . . receive . . . any property wrongfully appropriated in such manner as to constitute larceny, an information need not allege the name of the owner of the stolen property, where it charges that accused unlawfully and feloniously received certain cows from J. N. and W. T., knowing the same to have been stolen with intent to deprive the owner thereof of his property; since it is sufficient under §§ 2055 and 2066, to charge the offense substantially in the language of the statute in orderly and concise language so that a person of common understanding may know what is intended. *State v. Martin*... 313

RECITALS:

In judgment, see JUDGMENT, 2.

RECORDS:

On appeal, see APPEAL AND ERROR, 10-13.
Recording conditional sales contracts, see SALES, 8.

REDEMPTION:

From sale of property conveyed in fraud of creditors, see BANKRUPTCY, 4.

RED LIGHT LAW:

Abatement of nuisance under, see PROSTITUTION.

REDUCTION:

Of damages by owner in contemplation of second condemnation, see EMINENT DOMAIN, 8.

REFUSAL:

To discharge satisfied mortgage, see MORTGAGES, 1-5.

REGULATION:

Of carriers, see CARRIERS, 1-5.
Of interstate commerce, see COMMERCE.
Sale of liquors, see INTOXICATING LIQUORS.
Of sales of goods by weight or measure, see WEIGHTS AND MEASURES.

RELEASE:

As evidence in civil action, see EVIDENCE, 3.
From liability as surety, see PRINCIPAL AND SURETY, 2-4.

1. RELEASE — CONSIDERATION — VOLUNTARY PAYMENTS AND SERVICES. In an action for personal injuries sustained by plaintiff when struck by defendant's automobile, a release signed by the plaintiff, in consideration of the payment of plaintiff's hospital bills and bills for repairing his wagon and for defendant's services as a physician in attending the plaintiff, is inadmissible upon a plea of accord and satisfaction, where it appears that payment of the hospital bills and the services of the physician were voluntary, which, with payment for the property, constituted no consideration for a release of damages for the personal injuries. *Shilliam v. Newman*..... 637

REMAND:

Of cause on appeal or writ of error, see APPEAL AND ERROR, 39.

REMOVAL:

From state as affecting homestead rights, see HOMESTEAD, 2, 3.

RENDITION:

Of account, see ACCOUNT STATED.

RENT:

See LANDLORD AND TENANT, 6.

REPEAL:

Of statute relating to informations against habitual criminals, see CRIMINAL LAW, 5.

REPLEVIN:

Premium on bond as costs, see COSTS, 1.

REQUESTS:

For instructions, necessity for purpose of review, see APPEAL AND ERROR, 4.

RESCISSION:

Of contract, see CONTRACTS.

Oral rescission of option for sale of real estate, see FRAUDS, STATUTE OF, 1.

RESIDENCE:

To establish homestead, see HOMESTEAD, 1.

RES IPSA LOQUITUR:

See MASTER AND SERVANT, 11, 12.

RES JUDICATA:

See JUDGMENT, 3.

Conclusiveness of judgment as to assessment for drainage district, see DRAINS, 1.

Conclusiveness of award in proceedings to condemn right to damage streets by flooding, see MUNICIPAL CORPORATIONS, 9, 10.

RESPONSIVENESS:

Of answer, see WITNESSES, 4.

RETURN:

Of election, see ELECTIONS, 1.

REVIEW:

See APPEAL AND ERROR.

In criminal prosecution, see CRIMINAL LAW, 10-17.

ROADS:

Streets in cities, see MUNICIPAL CORPORATIONS, 14-27.

SAFE PLACE TO WORK:

See MASTER AND SERVANT, 10.

SAFETY DEVICES:

Apportionment of cost to railroads crossing at grade, see RAILROADS, 1-4.

SALES:

Regulation of commerce, see COMMERCE.
Estoppel of vendor under conditional sales contract to recover damages to property, see ESTOPPEL, 1.
Fraud in sale of automobile, see FRAUD, 1-3.
Requirements of statute of frauds, see FRAUDS, STATUTE OF, 3.
Execution sale of homestead, see HOMESTEAD, 4.
Of poison without label, see HOMICIDE, 1, 3, 4.
On foreclosure of mortgage, see MORTGAGES, 6.
Right of vendor of goods to trade-mark name, see TRADE-MARKS AND TRADE-NAMES, 1.
Of goods by weight or measure, see WEIGHTS AND MEASURES.

1. SALES—BY SAMPLE—CONDITIONS—WAIVER. Where a contract for poles did not specify the quality, but a sample was submitted and accepted, there was a waiver of any claim that the poles were to be of any different quality than the sample. *Schulze v. Buckeye Lumber Co.* 520

2. SALES—WARRANTIES—BREACH. Where plaintiff installed a compressor in defendant's refrigerating plant, under express warranties, and upon its proving so defective in operation that the defects could not be remedied, plaintiff furnished a new compressor to take its place, plaintiff did no more than the warranties required, and therefore had no right of action on *quantum meruit* for the value of the new one. *United Iron Works v. Rathskeller Co.* 67

3. SAME—WARRANTIES—BREACH—WAIVER—USE OF ARTICLE. The use for some time of a compressor installed in a refrigerating plant under express warranties, does not waive breach of the warranties, where the defects were hidden and not readily discoverable, the seller continued promises and efforts to cure the defects until a new one was furnished, and from time to time gave assurances that the defect was not serious. *United Iron Works v. Rathskeller Co.*... 67

4. SALES—WARRANTY—PERFORMANCE OR BREACH. A contract for a hoist according to plans and specifications, to be fitted to defendant's gasoline logging engine, already in use, and to be "connected to a pinion shaft with cut gears, to get two speeds on drums," with specified revolutions per minute, the hoist having no power itself, does not guarantee the power of the engine to drive the drums at such speeds, and the failure of the engine to develop such speeds does not constitute a breach of warranty. *Mianus Motor Works v. Vollans* 209

5. SAME—BREACH—DAMAGES—WAIVER. Loss of profits on breach of a contract for the sale of poles purchased for resale, is not waived by a request to ship the poles after the time specified for delivery, where the request was made in an attempt to minimize the damages and in the hope of still effecting the resale. *Schulze v. Buckeye Lumber Co.* 520

SALES—CONTINUED.

6. SALES—FOR RESALE — BREACH — MEASURE OF DAMAGES — MARKET PRICE. Upon breach of a contract for the sale of poles, which the vendor knew were purchased for resale, at Chicago, the measure of damages is the loss of profits, at the market price in that market, and the price received is some evidence of that market price. *Schulze v. Buckeye Lumber Co*..... 520

7. SALES—CONDITIONAL SALES—BUYER—RIGHTS AS TO TRESPASSERS—ACTIONS—REAL PARTY IN INTEREST. A vendee in possession under a conditional sales contract may maintain an action for injuries to the property, as the "real party in interest," within the meaning of Rem. Code, § 179, the same as though he were a bailee; especially in view of the defendant's right to bring in additional parties. *Stotts v. Puget Sound Traction, Light & Power Co*..... 339

8. SALES — CONDITIONAL SALES — LOGGING ENGINE — "RAILROAD EQUIPMENT" — STATUTES GOVERNING. A conditional sale to a logger of a small twenty-ton locomotive engine, known as a "dinkey" engine, which was shipped on a flat car, and was to be used exclusively on a short logging track, falls within Rem. Code, § 3670, providing that all conditional sales of personal property shall be absolute as to subsequent creditors, unless a memorandum of the sale is filed in the auditor's office of the county where the vendee resides, and not within Rem. Code, § 8741, providing that no contract for a conditional sale of railroad equipment or rolling stock retaining title in the vendor shall be valid against subsequent creditors unless evidenced by an instrument duly acknowledged and filed for record in the office of the auditor of the county in which is situated the principal office of the vendee; since the words "railroad equipment and rolling stock" used in the latter section, apply only to such equipment used by a railroad company acting as a common carrier. *Brady & Son v. Bell*..... 496

SALOON:

Lease of premises for saloon business, termination by prohibition act, see LANDLORD AND TENANT, 1-5.

SAMPLE:

Sales by sample, see SALES, 1.

SCHEDULE:

Of property in bankruptcy, see BANKRUPTCY, 1, 2.

SCHOOLS AND SCHOOL DISTRICTS:

Title and subject of act for establishment and maintenance of public school system, see STATUTES, 1.

SELF-DEFENSE:

See HOMICIDE, 2.

SENTENCE:

Excessive punishment for contempt of court, see CONTEMPT, 4.

SEPARATE ESTATE:

Of spouse, see HUSBAND AND WIFE, 1, 2.

SERVICE:

Notice of appeal, see APPEAL AND ERROR, 5, 6.

SET-OFF AND COUNTERCLAIM:

1. SET-OFF AND COUNTERCLAIM — BILLS AND NOTES — BANK DEPOSIT. Both at common law and under Rem. Code, §§ 264-266, in a bank's action upon notes given for a deposit credit, the depositor is entitled to offset the amount of the deposit and thus satisfy the debt, if it did not exceed the deposit credit. *Puget Sound State Bank v. Washington Paving Co*..... 504

2. SET-OFF AND COUNTERCLAIM—NOTES—BANK DEPOSIT—"DEMAND"—STATUTES. A company's deposit credit in a bank, given in consideration of notes to the bank, is such an existing "demand" or cause of action as can be set off against the amount due upon the notes, after transfer to one who is not a holder of the notes in due course, although no demand had been made on the bank at the time of the transfer of the notes; in view of Rem. Code, § 266, providing that a defendant in a civil action upon contract may set off a "demand" of like nature against the plaintiff which existed and belonged to him at the time of the commencement of the action, and also against an assigned note, negotiated in good faith, provided such demand existed at the time of the assignment and belonged to the defendant in good faith before notice of the assignment, and might have been offset against the person originally liable. *Puget Sound State Bank v. Washington Paving Co*..... 504

3. SAME. Such a deposit credit at least becomes a matured demand upon the insolvency of the bank. *Puget Sound State Bank v. Washington Paving Co*..... 504

SETTLEMENT:

Of claim for personal injuries, see RELEASE.

SHIPPING:

Application of workmen's compensation act to employment in maritime service, see MASTER AND SERVANT, 1-5.

Foreclosure of lien for construction of vessel, see MECHANICS' LIENS, 1, 2, 11.

SIDEWALKS:

Injuries from snow and ice, see MUNICIPAL CORPORATIONS, 16, 17.

SIGNATURES:

Of wife to mortgage on land obtained by fraud, see HUSBAND AND WIFE, 2, 4.

SILENCE:

Upon receipt of bill rendered, see ACCOUNT STATED.

SLANDER:

See LIBEL AND SLANDER.

SPECIFIC PERFORMANCE:

1. SPECIFIC PERFORMANCE—CONTRACTS—DESCRIPTION—CERTAINTY. An agreement for the exchange of properties, describing a tract as "48 acres more or less bounded upon the north by Cedar creek, situated about one mile east of Etna, Wash.," is too indefinite for specific performance, notwithstanding the further mention that it was the "same property conveyed to the party of the first part by W. Tate and wife in 1912," where the Tate deed was not delivered with the contract; since parol evidence would be necessary to assist in identifying the land. *Gilman v. Brunton*..... 1

2. SAME—DEFENSES—TENDER AND ABILITY TO PERFORM—EVIDENCE—SUFFICIENCY. Specific performance of a contract for an exchange of properties is properly denied, where plaintiff's tender of his deed was insufficient as being outside the chain of title, and he failed to furnish an abstract within the time agreed upon, although demanded, and an abstract furnished at the trial showed transactions that were hardly in good faith, and that plaintiff had not been ready, able and willing to perform on his part. *Gilman v. Brunton*..... 1

3. SAME — DEFENSES — EQUITABLE DEFENSES — UNCONSCIONABLE CONTRACT. Specific performance will not be decreed against parties who were induced by fraud to give property of the value of $11,100 for property not worth more than $7,700, although they made their own examination; since a court of equity will not lend its aid to enforce an unfair contract, leaving the party to his remedy in an action at law for damages. *Gilman v. Brunton*..... 1

STARE DECISIS:

See COURTS.

STATEMENT:

Of case or facts for purpose of review, see APPEAL AND ERROR, 10-13.

STATES:

Courts, see COURTS, 2.

Appeal from order granting motion in arrest of judgment, see CRIMINAL LAW, 11.

Condemnation of land for state road, see EMINENT DOMAIN, 5, 9-13.

STATES—CONTINUED.

Interstate extradition, see EXTRADITION.

Construction of statutes from other states, see STATUTES, 4.

1. STATES—FUNDS—APPROPRIATIONS—FORM. Neither Const., art. 8, § 4, providing that no money shall be paid out of the treasury except in pursuance of an appropriation by law, nor Rem. Code, § 9008, prohibiting the state auditor from issuing any state warrant unless there is a law authorizing the issue of the same, requires that an appropriation of moneys shall be in any particular form of words, but the same may be made by a general act clearly showing the legislative intent. *State ex rel. Peel v. Clausen*..... 166

STATUTES:

See HOMESTEAD; LICENSES, 1, 3, 4; RECEIVING STOLEN GOODS; SET-OFF AND COUNTERCLAIM.

Bonds on appeal, see APPEAL AND ERROR, 8, 9.

Preparation of statement of facts on appeal, see APPEAL AND ERROR, 12.

Requiring attorney to deliver over money or papers received in course of employment, see ATTORNEY AND CLIENT.

Negotiability of notes, see BILLS AND NOTES, 1, 2.

Provision for penalty by public service commission for failure to furnish cars as regulation of interstate commerce, see CARRIERS, 4, 5.

Dismissal of criminal prosecutions as bar, see CRIMINAL LAW, 3.

Charging accused with being an habitual criminal, see CRIMINAL LAW, 5.

Appeal by state in criminal action, see CRIMINAL LAW, 11.

Right of action for wrongful death, see DEATH.

Authorizing supplemental assessment for drainage district, see DRAINS, 2.

Powers and duties of canvassing board for irrigation district election, see ELECTIONS, 1.

Taking of property under claim of title in good faith as defense to prosecution, see EMBEZZLEMENT, 1.

Condemnation proceedings, see EMINENT DOMAIN, 4, 5, 10, 11.

Disposition of fines for breaches of penal statutes, see FINES.

Statute of frauds, see FRAUDS, STATUTE OF.

Joinder of offenses, see INDICTMENT AND INFORMATION.

Prohibiting interest by manufacturer in retail liquor business, construction, see INTOXICATING LIQUORS.

Defamation of deceased person, see LIBEL AND SLANDER, 2, 3.

Of limitation, see LIMITATION OF ACTIONS.

Workmen's compensation act, see MASTER AND SERVANT, 2, 5-7.

Notice to owner of furnishing of materials, see MECHANICS' LIENS, 11.

Location of mining claims, see MINES AND MINERALS, 1, 2.

Damages for mortgagee's failure to discharge mortgage after satisfaction, see MORTGAGES, 1, 5.

STATUTES—CONTINUED.

Sale of property on foreclosure of mortgage, see MORTGAGES, 6.
Requiring permit and bond for operation of motor vehicles for hire in cities of first class, see MUNICIPAL CORPORATIONS, 14, 15.
Providing for apportionment between railroads of cost of making railroad crossing at grade, see RAILROADS, 1-4.
Contractor's bond on railroad work, see RAILROADS, 7, 8.
Records of conditional sales contracts, see SALES, 8.

1. STATUTES—TITLE AND SUBJECTS—SCHOOLS. The establishment and maintenance of the public school system are sufficiently correlated to be embraced in one act; hence the provision in the school code, which is entitled an act for the establishment and maintenance of the public school system, that fines imposed for breaches of the penal statutes shall be applied to the support of the schools, does not violate Const., art. 2, § 19, providing that no bill shall embrace more than one subject and that shall be expressed in the title. *Slayden v. Carr* 412

2. STATUTES—PLEADING—AMENDMENT—SUFFICIENCY. The general allegation as to the laws of Alaska on a certain subject is sufficiently amended at the trial by an amended complaint setting forth the specific statutes relied upon and alleging that it was the only regulation on the question in the statutes of Alaska. *Lipsett v. Dettering* 629

3. SAME—LEGISLATIVE CONSTRUCTION. A law, reenacted with amendments, after it has received a judicial construction, must be considered as adopting such construction. *Whittlesey v. Seattle*... 645

4. STATUTES—CONSTRUCTION—ADOPTED LAWS. In adopting the law of another state, changes in wording and phrasing will be presumed to have been made deliberately and with a purpose to limit, qualify, or enlarge the adopted law. *Whittlesey v. Seattle*..... 645

5. SAME—EVIDENCE—FOREIGN LAWS. A printed copy of the statutes of Alaska and the evidence of an attorney that the volume contained all the statutes in that territory on the subject in question, is sufficient *prima facie* proof of the laws of Alaska on the subject. *Lipsett v. Dettering*..... 629

STENOGRAPHERS:

Notes of official court stenographer as part of record on appeal, see APPEAL AND ERROR, 12.

STIPULATIONS:

Parol waiver of stipulation as to quality of goods sold, see FRAUDS, STATUTE OF, 3.

STOCK:

Corporate stock, see CORPORATIONS, 1.

STOCKHOLDERS:

Of corporations, see CORPORATIONS, 1.

STOLEN GOODS:

See RECEIVING STOLEN GOODS.

STREET RAILROADS:

1. STREET RAILROADS—COLLISION — DUTIES OF MOTORMAN — INSTRUCTIONS. In an action for injuries to an auto truck, struck by a street car, it is not error to instruct that the motorman must use every reasonable effort and all means at hand to avoid colliding with another vehicle and to have the car under control so that he may stop it promptly, when coupled with other instructions to the effect that he had the right to assume that the auto would get off the track and was not required to stop until the danger was imminent. *Stotts v. Puget Sound Traction, Light & Power Co.*..... 339

2. STREET RAILROADS — COLLISION AT CROSSING — NEGLIGENCE — EVIDENCE—SUFFICIENCY—FAILURE TO RING BELL. A collision between a taxicab and a cable car is shown to be due solely to the negligence of the driver of the taxicab, where it appears that both were approaching a street intersection at about the same speed, that the cable car was in view three blocks away and stopped in the middle of the street as was customary, reaching there first, when the taxicab ran into the middle of the side of the cable car; and in such case it is immaterial that no bell was rung on the cable car. *Camozzi v. Puget Sound Traction, Light & Power Co.*..... 545

STREETS:

See MUNICIPAL CORPORATIONS, 14-27.

Condemnation for public street, see EMINENT DOMAIN, 2.

SURETYSHIP:

See PRINCIPAL AND SURETY.

TAXATION:

See DRAINS; LICENSES.

As interference with interstate commerce, see COMMERCE.

As taking of property without due process of law, see CONSTITUTIONAL LAW, 4.

Of costs, time for, see COSTS, 2.

Oil inspection fees, see CUSTOMS DUTIES.

TENDER:

Sufficient tender of deed as affecting right to enforce contract, see SPECIFIC PERFORMANCE, 2.

TERM:

Of office, designation in ballot, see ELECTIONS, 2.

TERMINATION:

Of lease of premises for saloon purposes, by prohibition law, see LANDLORD AND TENANT, 1, 4, 5.

TIME:

For taking appeal, see APPEAL AND ERROR, 5, 6.
For taxation of costs, see COSTS, 2.
For motion for new trial, see NEW TRIAL, 2.
Extension of time for payment of note as releasing surety, see PRINCIPAL AND SURETY, 4.
For payment of specific legacy, see WILLS.

TITLE:

See EJECTMENT.
Taking property under claim of title in good faith, see EMBEZZLEMENT, 1.
Statutes, see STATUTES, 1.

TORTS:

See FRAUD; LIBEL AND SLANDER.
Action in contract or tort, joinder of, see ACTIONS.
Persons entitled to sue for wrongful death, see DEATH.
Negligent maintenance of county road, see HIGHWAYS.
Of employers, see MASTER AND SERVANT.
Of city, see MUNICIPAL CORPORATIONS, 18, 20, 23, 24.
Right of party insured against loss to sue as real party in interest, see PARTIES.

TRADE-MARKS AND TRADE-NAMES:

1. TRADE-MARKS AND TRADE-NAMES — PERSONS ENTITLED — VENDORS. Under Rem. Code, § 9492, making it unlawful to counterfeit, imitate, or use any "label, trade-mark, . . . or form of advertisement" adopted and filed for registration as required by the act, for the purpose of designating any goods, "as having been made, manufactured, produced, packed, or put on sale" by another, a person not originating or manufacturing goods is entitled to trade-mark a name for goods packed and "put on sale" by him. *Groceteria Stores Co. v. Tibbett* 99

2. SAME—NAMES SUBJECT—"GROCETERIA." The term "Groceteria," applied to grocery stores operated without the use of clerks or deliveries, in which the purchaser makes his own selections, may be trade-marked under Rem. Code, § 9492, where it is admitted that the person claiming the right to the same was the first to use the word. *Groceteria Stores Co. v. Tibbett*..... 99

3. SAME—INFRINGEMENT. The use of the words "Pacific Groceteria" is an infringement of a trade-mark of "Groceteria No. 1"; since it is sufficiently similar to deceive persons of ordinary caution. *Groceteria Stores Co. v. Tibbett*..... 99

TRADE-MARKS AND TRADE-NAMES—CONTINUED.

4. SAME—EXTENT OF PROPERTY—PLACE OF BUSINESS. A concern located at Seattle claiming a trade-mark of the name "Groceteria" registered under Rem. Code, § 9492, may maintain an action to enjoin the use of the name by another at Tacoma, where it is alleged in the complaint and admitted that plaintiff was doing business from its Seattle office with people in the city of Tacoma. *Groceteria Stores Co. v. Tibbett*..... 99

TRANSCRIPTS:

Of record for purpose of review, see APPEAL AND ERROR, 10-13.

TRESPASS:

Rights of vendee under conditional sales contract to sue for damage to property, see SALES, 7.

TRIAL:

See NEW TRIAL.

Exceptions or objections for purpose of review, see APPEAL AND ERROR, 2, 3.

Review of errors as dependent on presentation of same by record, see APPEAL AND ERROR, 10-13.

Trial *de novo* on appeal, see APPEAL AND ERROR, 14, 15.

Review of verdicts, see APPEAL AND ERROR, 24.

Review of errors as dependent on prejudicial nature of same, see APPEAL AND ERROR, 27-37.

Of criminal prosecution, see CRIMINAL LAW.

Right of defendant to instruction as to taking of property under claim of title in good faith, see EMBEZZLEMENT, 1.

Of accused on extradition, identity of charge, see EXTRADITION.

Instructions in action for fraud in sale of automobile, see FRAUD, 1-3.

Amendment of pleadings at trial, see PLEADING, 4.

Instructions in civil action for rape, see RAPE, 8, 9.

Instructions in action for damages to auto truck struck by street car, see STREET RAILROADS, 1.

1. TRIAL—MISCONDUCT OF COURT—FAIR TRIAL. In a civil action for rape, defendant's constitutional right to a fair trial is infringed, where the court suggested the calling of the public prosecutor when one of the defendant's witnesses was testifying as to his own improper conduct with plaintiff, and it is immaterial that no exceptions were taken, since a requested instruction to disregard such comment might not have removed the effect. *Eckhart v. Peterson* 379

2. TRIAL—LIMITING NUMBER OF WITNESSES—DISCRETION. In an action for personal injuries, it is an abuse of discretion to limit the number of eyewitnesses to the accident to six, after the defendant had examined five witnesses, where they had viewed the accident

TRIAL—CONTINUED.

from different angles and different distances and did not agree in all respects and their testimony was not confined to a single fact, and the defendant had other eyewitnesses to the accident present in court and ready to testify. *Mogelberg v. Calhoun*..... 662

3. SAME—OFFER OF PROOF—SUFFICIENCY. An offer of proof need not be specific where it was assumed that it would be competent, relevant and material and it was erroneously excluded on other grounds. *Mogelberg v. Calhoun*..... 662

4. TRIAL—EVIDENCE—OBJECTIONS. Objection that evidence is incompetent does not raise the point that the questions were leading. *State v. Moser*..... 465

5. TRIAL—QUESTION FOR COURT OR JURY—ASSESSMENT OF PENALTY. Where the facts show a mortgagor entitled to recover the $25 penalty provided by Rem. Code, § 8799, for failure to discharge a satisfied mortgage, the assessment of the damages is a matter of law for the court without testimony. *Morrill v. Title Guaranty & Surety Co.*..... 258

6. TRIAL—JURY TRIAL—WAIVER. A jury trial, before entry of a personal judgment in an action to foreclose a lien for cutting wood, is waived by failing to make objection below prior to entry of final judgment. *Gray v. Hickey*..... 370

7. TRIAL — INSTRUCTIONS — ISSUE — GENERAL NEGLIGENCE. Under a complaint charging specific acts of negligence, a charge to the jury on the subject of negligence is not open to the objection that it was too general, when it was as specific as the evidence was required to be. *Henry v. Navy Yard Route*..... 526

8. TRIAL—ISSUES—LAW OR EQUITY—JURY TRIAL. In an action in ejectment to recover parts of a vacated street that had been in controversy in a previous action, equitable issues are presented which make it proper to discharge the jury and try the case as an action to establish boundaries, under Rem. Code, § 947, where it appears that the parties are adjoining landowners, that, in the former action to recover possession of the strip of land, the verdict and judgment for a recovery of possession did not define the center of the street constituting the boundary line, which was still in dispute. *Weidlich v. Independent Asphalt Paving Co.*..... 395

TRUSTS:

Trust fund doctrine, see CORPORATIONS, 5.
Trust deeds, see MORTGAGES, 1-3.
Duty of trustee to tender satisfaction piece, see MORTGAGES, 2.

UNIFORMITY:

Of taxes, see LICENSES, 1, 4.

UNITED STATES:

Courts, when decisions controlling in state courts, see COURTS.

VALUE:

Opinions of vendor as to value of property, see FRAUD, 3.

VARIANCE:

As harmless error, see APPEAL AND ERROR, 29.
Between pleading and proof in civil action, see PLEADING, 6, 7.

VENDOR AND PURCHASER:

Sales by trustee in bankruptcy, see BANKRUPTCY, 3, 4.
Requirements of statute of frauds, see FRAUDS, STATUTE OF, 1, 2.
Transfer of ownership of personal property, see SALES.
Specific performance of contract, see SPECIFIC PERFORMANCE.

VERDICT:

Review on appeal, see APPEAL AND ERROR, 24.
In criminal prosecutions, see CRIMINAL LAW, 8.
Review on appeal or writ of error, see CRIMINAL LAW, 12.
In ejectment between adjoining landowners, see EJECTMENT.
Inadequate or excessive damages, see RAPE, 10.

VESSELS:

Application of provisions of workmen's compensation act, see MASTER AND SERVANT, 1-5.
Foreclosure of lien for construction of, see MECHANICS' LIENS, 1, 2, 11.

VESTED RIGHTS:

Supplemental assessment for drainage district as impairing vested rights, see DRAINS, 2.

VIADUCTS:

Condemnation of property by city for, see EMINENT DOMAIN, 4.

WAIVER:

See ESTOPPEL.
Error waived in appellate court, see APPEAL AND ERROR, 16, 17.
Of defects in or objections to attachment, see ATTACHMENT, 2.
Parol waiver of stipulation as to quality of goods sold, see FRAUDS, STATUTE OF, 3.
Of right to lien, see MECHANICS' LIENS, 7, 8.
Of claim as to quality of goods sold, see SALES, 1.
Of breach of warranty by use of article, see SALES, 3.
Of loss of profits on breach of contract, see SALES, 5.
Of jury trial, see TRIAL, 6.

WARRANTS:

Payment of award in condemnation by state, see EMINENT DOMAIN, 5, 11, 12.

WARRANTY:

On sale of goods, see SALES, 2-4.

WATERS AND WATER COURSES:

See DRAINS.

Condemnation of property devoted to public use, to furnish water to city, see EMINENT DOMAIN, 1.

WEIGHTS AND MEASURES:

1. WEIGHTS AND MEASURES—REGULATION — ORDINANCES — VIOLATION. A special contract for the sale of a commodity in bulk by gross weight, where the purchaser is not overreached or deceived, is not in violation of an ordinance which prohibits the sale of any commodity usually sold in bulk or quantity by weight or measure unless wrapped or measured on officially tested scales and unless the portion sold by weight or measure shall be the true net weight or measure which shall be plainly marked on the packages; since the purpose and intent of the ordinance is merely to protect the public from being defrauded by false weights and measures. *Seattle v. Yocum*. 194

WILLS:

1. WILLS—SPECIFIC LEGACY—DATE OF BEGINNING. A will directing payment to a niece of the sum of $30 each and every month during the life of the testator's wife, payable out of the net revenues of the estate, creates a specific legacy during the lifetime of the wife, and not an annuity; and hence commences immediately upon the death of the testator. *Jesseph v. Westerberg*..... 602

2. SAME—SPECIFIC LEGACY—FROM NET INCOME—DEFICIENCIES. Should the right to claim such a legacy be postponed until there is a net revenue or until the same can be determined upon final settlement, the sums payable, with all deficiencies, are to be paid at any time when there are any net revenues available. *Jesseph v. Westerberg* 602

3. SAME—SPECIFIC AND RESIDUARY LEGACY—TIME FOR PAYMENT. In such a case, a further direction to pay out of the net revenues the balance and residue of said net returns to the testator's wife, once each year during her natural life, simply makes the wife a residuary legatee of the net revenues, and is not a direction for yearly accounts to the first legatee who was to be paid each month. *Jesseph v. Westerberg* 602

4. SAME—SPECIFIC LEGACY—DEFERRED PAYMENTS — INTEREST. Under a will directing the payment of a legacy of $30 each and every

WILLS—CONTINUED.

month during the lifetime of the testator's wife, out of the net revenues of the estate, deferred payments during the time in which there were no net revenues do not draw interest until there is a fund in hand. *Jesseph v. Westerberg*..... 602

WITNESSES:

Estoppel by appearing as witness for party, see ESTOPPEL, 1.
Experts, see EVIDENCE, 5.
Privileged communications, see PHYSICIANS AND SURGEONS.
Corroboration of female in civil action for rape, see RAPE, 4.
Limiting number of at trial, see TRIAL, 2.

1. WITNESSES—COMPETENCY. A witness is competent to testify that she had noticed a broken iron grating at a certain place some months before, although she could not identify the particular grating offered in evidence, where she said it looked the same and she was satisfied it was the same grating. *Lichtenberg v. Seattle*..... 391

2. WITNESSES—COMPETENCY—TRANSACTIONS WITH PERSON SINCE DECEASED—"ADVERSE PARTY." Under Rem. Code, § 1211, excluding the testimony of a party in interest or to the record, as to transactions had with a party since deceased where the adverse party sues or defends as executor etc., an executor is an adverse party within the rule in a proceeding brought by a creditor to compel the executor to inventory certain property as community property in order to satisfy community debts. *In re Cunningham's Estate*..... 191

3. SAME—COMPETENCY—TRANSACTION WITH PERSON SINCE DECEASED—ADVERSE EVIDENCE. Upon an attempt by a creditor to subject the deceased wife's property to a community debt, evidence by the executor and his son that the property was in one instance a gift from the son to the mother, and in another a gift from the husband to the wife and that no community funds entered into the transactions, is not evidence "adverse" to the estate, nor is it inadmissible as testimony of a party in interest as to any transaction had with or statement made to or by the deceased, within Rem. Code, § 1211, excluding such testimony; and the statute does not exclude testimony that is not "adverse." *In re Cunningham's Estate*..... 191

4. WITNESSES—RESPONSIVENESS—CONVERSATIONS. Where a cross-examiner asks for a conversation had at a certain time, he cannot assign error in refusing to strike an answer which was in part responsive and relevant, although not what he sought to elicit. *Henry v. Navy Yard Route*..... 526

5. WITNESSES—INCRIMINATION OF WITNESS. That the testimony of a witness employed by and informed against with the accused, would tend to incriminate him, does not render the witness incompetent, and is not ground for objection by the accused. *State v. Moser*.. 465

WITNESSES—CONTINUED.

6. WITNESSES—IMPEACHMENT—CORROBORATION — INCONSISTENT STATEMENTS. Where the accused was impeached by the testimony of the sheriff that, at the time of his arrest, he had made inconsistent statements, a basis is made for argument to the jury that his testimony was a recent fabrication; hence, on rebuttal, accused is entitled to corroborate his testimony by showing that he made other statements consistent therewith on the day of his conversation with the sheriff. *State v. Spisak*..... 566

WOOD ALCOHOL:

Judicial notice of as poison, see EVIDENCE, 1.
Sale of without label, see HOMICIDE, 1, 3, 4.

WORK AND LABOR:

Liens for work and materials, see MECHANICS' LIENS.

WORKMEN'S COMPENSATION ACT:

See MASTER AND SERVANT, 1-9.
Abolition of civil remedy for injuries sustained by city employee as denial of equal protection of laws, see CONSTITUTIONAL LAW, 5.
Decisions of Federal courts relating to, conclusiveness, see COURTS, 2.

WRITINGS:

Parol evidence to vary writings, see EVIDENCE, 4.
Requirements of statute of frauds, see FRAUDS, STATUTE OF.

WRITS:

See ATTACHMENT; MANDAMUS.